

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

DANIEL AHNERT, ET AL.,)	CASE NO: 2:10-CV-00156-PP
)	
Plaintiffs,)	CIVIL
)	
vs.)	Milwaukee, Wisconsin
)	
EMPLOYERS INSURANCE COMPANY)	Thursday, January 4, 2018
OF WAUSAU, ET AL.,)	
)	(1:43 p.m. to 4:02 p.m.)
Defendants.)	(4:16 p.m. to 5:54 p.m.)

HEARING RE: DAUBERT MOTIONS AND MOTIONS IN LIMINE

BEFORE THE HONORABLE PAMELA PEPPER,
UNITED STATES DISTRICT JUDGE

APPEARANCES: SEE PAGE 2

Courtroom Deputy: Kristine Wrobel

Transcribed by: Exceptional Reporting Services, Inc.
P.O. Box 18668
Corpus Christi, TX 78480-8668
361 949-2988

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

EXCEPTIONAL REPORTING SERVICES, INC

APPEARANCES FOR:

Plaintiffs:

ROBERT G. MC COY, ESQ.
Cascino Vaughan Law Offices
220 S. Ashland Ave.
Chicago, IL 60607

Defendants:

TRAVIS J. RHOADES, ESQ.
LAURA E. SCHUETT, ESQ.
Crivello Carlson
The Empire Building
710 N. Plankinton Ave., Suite 500
Milwaukee, WI 53203

JOSHUA C. SCHUMACHER, ESQ.
Hepler Broom
2 Mark Twain Plaza
130 N. Main St.
P.O. Box 510
Edwardsville, IL 62025

1 Milwaukee, Wisconsin; Thursday, January 4, 2018; 1:43 p.m.

2 (Call to order)

3 **THE CLERK:** Court calls civil case 2010-cv-156,
4 *Daniel Ahnert, et al. versus Employers Insurance Company of*
5 *Wausau, et al.* Please state your appearances, starting with
6 the attorney for the Plaintiffs.

7 **MR. MC COY:** Yes, Robert "Bob" McCoy for the
8 Plaintiff.

9 **MR. RHOADES:** Good afternoon, Your Honor, Travis
10 Rhoades of Crivello Carlson, for Employers Insurance Company of
11 Wausau, Sprinkmann Sons Corporation, and Wisconsin Electric
12 Power Company.

13 **MS. SCHUETT:** And Laura Schuett as well, Your Honor,
14 for the same parties.

15 **MR. SCHUMACHER:** Joshua Schumacher of Hepler Broom
16 for Pabst.

17 **THE COURT:** And do we have anybody on the phone?

18 (No audible response)

19 Okay, sorry, got confused for a second. All right,
20 good afternoon, everybody. Welcome to the refrigerator. We
21 had scheduled this hearing this afternoon for a *Daubert*
22 hearing, ruling on *Daubert* motions, and I do want to get to
23 that in a minute, and some other things as well. But before we
24 do that, I wanted to pick up a couple of, I guess for lack of a
25 better term, odds and ends and see if there wasn't something we

1 could do with those as well. Back on July 20th, the Plaintiff
2 filed a motion asking that I apply one of the orders that was
3 entered in the MDL case and 2010 case when it was MDL
4 litigation to this now-consolidated case. That is for your
5 information for our docket, Docket Number 110, and it is the
6 motion to apply MDL number 875, expert deposition protocol
7 order for fee payment to the consolidated Ahnert case. And
8 basically what that motion does is explain that when the case
9 was in MDL, Magistrate Judge Strawbridge put into place or set
10 up a protocol for payment of expert witness fees. And the
11 motion just generally asks that I apply that same motion to
12 both the '13 and the '10 case, of course what are now
13 consolidated into one case. There was objection to it and then
14 a response or a reply. The motion was filed I think before the
15 2017 depositions were taken, I believe, or at least around the
16 time they were about to -- some of them were about to start.
17 And then the responses and replies were filed afterward. And
18 unless I'm misunderstanding something, it seems to me that the
19 bottom line here, I don't know what the relevance of the
20 protocol in the MDL case is or isn't. The bottom line is that
21 if under the Federal Rules of Civil Procedure somebody requests
22 payment for expert fees that the opposing side feels are
23 excessive, the opposing side can object. Now, the MDL order
24 seemed to set a timeframe for that and requirement as to when
25 those objections should be filed and that sort of thing. Okay,

1 grand idea in MDL cases I think, and probably other cases as
2 well. But the bottom line issue here seems to be whether or
3 not people agree over whether certain portions of the fees
4 ought to be compensable. And I don't know what that has to do
5 or not to do with the MDL order. It seems just a natural
6 question that arises in any case involving expert witnesses.
7 And so it seems to me rather than taking an order from one case
8 and applying it in another case and -- I don't know why if
9 there is still a dispute about payment of fees -- and as far as
10 I could tell from that string of emails that you may recall the
11 Plaintiff attached to the motion, the parties were in the
12 process of discussing getting itemized bills and going through
13 and separating out what were administrative expenses versus
14 what were prep expenses and what were testimony expenses, what
15 the -- you know, separating out travel and things like that. I
16 don't know where that really ended up but the string of emails
17 seemed to have kind of stopped as people were still discussing
18 things. If itemized bills or invoices have not been completely
19 exchanged, then I would think that the solution would be that
20 we do that. And then if the Plaintiff has any objection to any
21 specific fees, the Plaintiff -- I can set a deadline and the
22 Plaintiff can explain what the objections are and I can rule on
23 that. And same I guess if the Defendants have any objections
24 to Plaintiffs' experts. It seems to me that -- I hate to be
25 overly simplistic, but it seems to me that that might solve

1 whatever the issue is, unless you all have worked through some
2 of these issues yourselves already. Mr. McCoy?

3 **MR. MC COY:** That has been resolved, the expert fee
4 issue. But the timeframe I think was the key as to when it
5 should happen. And that's really all that's needed. So if we
6 have a timeframe for providing the bills -- I can't remember
7 whether we submitted bills or not, I just can't remember that.

8 **THE COURT:** Yeah, there were some. I don't -- to be
9 totally frank, I can't tell you whether all of them were
10 submitted. I know there were some that were submitted.

11 **MR. MC COY:** I mean, I'm sure my firm's paid all
12 these bills by now so we have the bills and we can submit those
13 to the defense within -- you know, within seven days, and then
14 a period of time for objections. I don't believe we took any
15 depositions of defense experts.

16 **THE COURT:** Okay, so you think seven days then to get
17 the bills to the defense?

18 **MR. MC COY:** Right, and then --

19 **THE COURT:** And then I'll set a deadline, okay, thank
20 you. And then, Mr. Rhoades, what kind of time do you -- would
21 you think -- well, first of all, any comments on what I've
22 already said? And then, second of all, what kind of time do
23 you think you need to get invoices?

24 **MR. RHOADES:** Well, the only issue for us was to get
25 the itemizations because we -- and I'm working from memory here

1 so forgive --

2 **THE COURT:** I know, sorry.

3 **MR. RHOADES:** -- me if I get this wrong, but I
4 believe we have at least one expert and maybe a couple that
5 billed us at their normal expert rate for gathering their file-
6 type activities and we just didn't think that that was fair,
7 and we didn't think we owed that under the rules. And so what
8 we asked for was for these experts to give us some -- in their
9 bills, give us some sense of what was administrative work and
10 what was actual expert work, and that we didn't have an
11 objection to paying the expert fees but we didn't want to pay
12 them for paperclipping their reports together.

13 **THE COURT:** Right.

14 **MR. RHOADES:** And so to the extent we get bills that
15 actually divide that out, then I think we can relatively
16 quickly turn around any objections to that, maybe ten days
17 after.

18 **THE COURT:** Okay. Mr. Schumacher?

19 **MR. SCHUMACHER:** I don't have anything to add. I
20 would be in full agreement with Mr. Rhoades.

21 **THE COURT:** Okay. So then why don't we do this?
22 Today being the 4th, how about, Mr. McCoy, I give you until the
23 end of the day on the 12th, so next Friday, if that's enough
24 time? I think you asked for a week and it's a little bit
25 longer.

1 **MR. MC COY:** That's okay.

2 **THE COURT:** Okay. And then objections, the deadline
3 for objections, why don't we say the 26th of January, a few
4 days over ten days, but give the Defendants that amount of
5 time. And then, Mr. McCoy, if you get any objections, how
6 about the 9th of February for a response?

7 **MR. MC COY:** That's okay, Judge. The only
8 qualification I might have on this is if we need to contact
9 some expert to get more information about an item on the
10 bill --

11 **THE COURT:** Then just let me know that --

12 **MR. MC COY:** -- they may -- some of them may not
13 always be available, they may be gone. But, I mean, I don't
14 know who is or who isn't gone.

15 **THE COURT:** Then all you need to do is just let me
16 know you need more time because somebody's M-I-A, then we can
17 work around that. I'm just picking a date so that assuming no
18 difficulty, we kind of know where this is tracking to. So what
19 I'm going to do is deny the motion to apply MDL 875, expert
20 deposition protocol, and instead -- I'll deny that and then
21 I'll put in place and it'll show up in these minutes the dates
22 that we just set for getting the invoices disclosed,
23 objections, and responses. And then we'll see if there's
24 anything that needs to be hammered through at that point. All
25 right, thank you all for that. I'm sorry to -- I know that's a

1 -- it's an oldy. But I figured as long as we're all here
2 together, if we could take care of a little bit of
3 housekeeping, that might be one bit of housekeeping that we
4 could take care of.

5 And the second bit of housekeeping that I was hoping
6 -- I think may to some extent already have taken care of
7 itself, but I wanted to double-check. On September 21st, at
8 Docket Number 114, the Plaintiff filed a motion to strike and
9 limit untimely disclosed trial witnesses. And it's filed as
10 part of a *Daubert* motion package. But specifically, this one
11 has less to do with the notion of whether somebody should be
12 allowed to testify as an expert. And the Plaintiff makes
13 reference to the fact that over the course of years in this
14 case, the Defendants have talked about all sorts of people who
15 may or may not be experts for this, that, or the other thing.
16 And as I read, the motion basically says, you know, if you
17 haven't timely filed reports for those people and you haven't
18 followed the rules of the particular judge that you were in
19 front of for those people, that those people should be
20 stricken. The response, as far as I read it, was basically
21 that Pabst had already proposed that it was going to call Gary
22 Crawford and it had timely disclosed Gary Crawford's expert
23 witness report. And Pabst basically said in his response
24 that's who we plan to call at trial, yeah, we've talked about
25 other people and we've kind of, you know, here and there, but

1 the -- who we plan to call at trial is Gary Crawford and so if
2 what they're asking is us to be limited to Gary Crawford, fine,
3 that -- we're fine with that. And the same thing with
4 Sprinkmann and WEPCO with regard to Michael Hentgen -- am I
5 saying it correctly?

6 **MR. RHOADES:** Correct.

7 **THE COURT:** That his report was timely disclosed and
8 that they're perfectly -- that Sprinkmann and WEPCO are
9 perfectly happy to represent that that's who they're calling at
10 trial. The only issue I think that sort of wasn't resolved or
11 conceded was one that perhaps is a little bit unclear, and that
12 is that WEPCO named Mr. Paulsen on the witness list and
13 actually identified him both as a lay witness, as an expert
14 witness. He's an employee of WEPCO, at least he was at the
15 time. I don't know if he still is, but was at the time. And
16 he has historical knowledge not only about WEPCO procedures in
17 general but specific to the Oak Creek plant based on his years
18 of working there and his experience. And so I read WEPCO's
19 response is kind of questioning a little bit, is there an issue
20 with regard -- is part of this motion an issue with regard to
21 calling Mr. Paulsen, given that he is as I understand it almost
22 mostly a fact witness, possibly there's some hybrid nature if
23 he's going to talk about, you know, specific knowledge as it
24 relates to asbestos, but more of a fact witness with regard to
25 what's been going on at the WEPCO plants, and particularly at

1 the Oak Creek plant. And so I think that was the one sort of
2 unclear thing was WEPCO kind of wondering how Mr. Paulsen fits
3 in to the Plaintiffs' motion. But other than that, it seemed
4 to me that this motion pretty much is moot. So I guess first
5 I'll ask, Mr. McCoy, with regard to the two experts that have
6 been put forward as expert witnesses to testify at trial,
7 Mr. Crawford for Pabst, and Mr. Hentgen for WEPCO and
8 Sprinkmann, does that resolve your concerns with regard to
9 those experts?

10 **MR. MC COY:** Yes, Your Honor. Actually I think in
11 our motions we said that Crawford for Pabst and Hentgen for
12 Sprinkmann and WEPCO are fine.

13 **THE COURT:** Right.

14 **MR. MC COY:** We have no questions about them.
15 Paulsen, if I can jump ahead there, Judge, I -- just looking at
16 this, I see where at one point he was tendered for deposition.
17 I suppose we didn't know about the expert opinions he might
18 have. But as far as I'm concerned, I mean, since the trial
19 date moved and there's more time here, if they want -- the way
20 I would propose to resolve it was if they want to provide an
21 expert report of Paulsen's opinions, then I won't object any
22 further as long as we can take his deposition. That's how I
23 would propose to resolve it now with the additional time.

24 **THE COURT:** And I guess to that suggestion from
25 Mr. McCoy, my question to you, Mr. Rhoades, was going to be, I

1 read the summary of what Mr. Paulsen was going to testify to,
2 and it's a little bit unclear as to what of it might be in an
3 expert category as opposed to what the guy just knows from his
4 years working there. So I don't know if -- I don't know --

5 **MR. RHOADES:** Right. And I don't know if this
6 clarifies it for the -- I have no intention of offering Tom to
7 offer what would typically be considered expert opinion
8 testimony in a case like this. But he is the chief safety
9 officer at WEPCO and he has some specialized knowledge with
10 respect to asbestos because he's worked there forever. And so
11 I don't know, because we tendered him but he was never deposed,
12 what the Plaintiff might ask him about. And I suppose we can
13 deal with those issues at trial. If they open a door, then I
14 presume I'll be allowed to walk through it. But, you know, in
15 terms of normal, typical expert opinion, I don't intend to have
16 him offer any.

17 **THE COURT:** And let me try to see if I can't clarify
18 a little bit, because I -- this is the sort of situation as I'm
19 sure all of you have experienced where suddenly something
20 happens at trial and someone hops up and says, wait, wait,
21 that's an expert opinion and you said you weren't going to, and
22 then somebody else responds and says, oh, no, it's not, and I
23 didn't. Obviously the issue here is causation. I mean, that's
24 what I think the major battle has come down to. And I could
25 imagine someone like Mr. Paulsen testifying about what his

1 experience was in terms of how asbestos ought to be handled,
2 how it ought to be treated, maybe what his understanding was of
3 what kind of training people ought to get if they're working
4 around asbestos, things of that nature, what training, if any,
5 was given. But for him to provide testimony saying, I
6 understand that this is what causes mesothelioma or causes
7 someone to die of mesothelioma or any of the other causation
8 issues, that clearly would be wandering over a pretty black and
9 white line it seems to me; is that what you're thinking?

10 **MR. RHOADES:** Yeah. And our position is anybody with
11 an IH background shouldn't be testifying about medical
12 causation issues anyway.

13 **THE COURT:** Right.

14 **MR. RHOADES:** I mean, so I would never offer him or
15 Mr. Hentgen for that matter to argue medical causation issues.

16 **THE COURT:** Okay.

17 **MR. MC COY:** I would -- just looking at this
18 disclosure -- and, again, if you don't have something that the
19 witness themselves signed, you don't know what they're actually
20 going to testify to at trial. If it's in their -- if it's got
21 their signature on it like a 26(a)(2) report, then you know
22 that's their opinion and that's the basis and that's the
23 ballpark that you're playing in. I mean, here we have
24 references in this attorney-written summary which don't bind
25 Mr. Paulsen. But it says things like "threshold limit values,"

1 which I'm assuming he's probably going to provide some opinions
2 that the threshold limit values were protecting the workers and
3 that's what the understanding was of himself or WEPCO. I also
4 assume he's probably going to testify to situations in which
5 these permissible exposure limits are or are not exceeded, and
6 that's also opinion testimony. It says, "Studies with respect
7 to power plants." That seems to me almost inherently an expert
8 opinion type of basis that he's going to say, well, you know,
9 the studies didn't show that it was a dangerous conditions. I
10 just can't imagine how a lot of his testimony isn't going to
11 take the form of some opinions based on these topics that he's
12 disclosed about.

13 **THE COURT:** Well, let me -- again, I guess we need to
14 clarify language a little bit. Lay witnesses can give opinions
15 but they're limited to personal experience. They can't rely on
16 hearsay, they can't rely on, for example, studies with respect
17 to power plants. So if he's not going to be called as an
18 expert, then he can't rely on hearsay. That doesn't mean he
19 can't give an opinion. It simply means that that opinion has
20 to be based on his own personal knowledge, just like any other
21 lay witness.

22 And I guess with regard to the issues on threshold
23 limit values, there's a difference in my mind, I would think
24 hopefully in other people's, between somebody saying in my job,
25 I understood that the threshold limit value was this, that's a

1 fact that I understood, and I understood that, you know, I
2 wasn't supposed to exceed -- our plant was not supposed to
3 exceed a particular threshold. Whether that is a scientific
4 opinion or a hybrid opinion about whether that threshold is
5 right or wrong and whether that threshold, exceeding it could
6 cause this or could cause that or the other thing, that's an
7 expert witness opinion. But to simply say, you know, I'm a
8 realtor and I was told that the house should be sold for
9 \$50,000 and so that's what I listed it for. That person's not
10 giving you an opinion on whether \$50,000 is the right
11 valuation; they're simply telling you that's the fact they
12 understood and they were operating under. So, I mean, I
13 understand that this -- a gentleman like this is the kind of
14 person who it might be easy to slip over into expert testimony.
15 But if he's not being put forward as an expert and he's not
16 being put forward to testify on giving expert opinions, then
17 Mr. Rhoades's suggestion that at trial if we -- if suddenly he
18 starts relying on hearsay, I assume Mr. McCoy will hop out of
19 his chair and I'll listen and I'll say, yeah, nuh-uh, and
20 that's where we go.

21 **MR. MC COY:** And just other examples, Judge, I
22 understand what you're saying and I agree with that way you
23 characterized "lay" versus "expert" on those issues. But we
24 also have things like "construction practices" and "scheduling
25 of work." So, again, I don't know that Mr. Paulsen was an

1 employee that in the time period of Ahnert's work --

2 **THE COURT:** Well, that's a different issue.
3 That's --

4 **MR. MC COY:** And --

5 **THE COURT:** -- whether or not he has personal
6 knowledge about a fact that he can testify to.

7 **MR. MC COY:** Right. And that's why I say when you
8 get down to construction practices, his opinion is, well, we
9 don't put the pipefitters like Mr. Ahnert next to the
10 insulators because the insulator's work is always done before
11 the pipefitters. I mean, that's the kind of opinion that again
12 I typically see these type of corporate witnesses express.

13 **THE COURT:** But that's not an expert witness opinion.
14 That's saying in our practice, in our company, we don't station
15 people at "X" place. And if your response is, hey, you weren't
16 even there when we alleged that this exposure happened, then
17 that's an appropriate objection. But it's not an expert
18 witness objection, it's a you don't have the factual background
19 to be able to testify this competent -- to this competently as
20 a lay witness, right?

21 **MR. MC COY:** Well, it's lack of personal knowledge --

22 **THE COURT:** Right.

23 **MR. MC COY:** -- of what -- how it was done back then.

24 **THE COURT:** That's it, and --

25 **MR. MC COY:** So --

1 **THE COURT:** -- that's a lay witness objection.

2 **MR. MC COY:** Right. So if his opinion is, well, it
3 had to be done that way because that's how we would do it, that
4 to me is an expert opinion because he doesn't have personal
5 knowledge that -- of what happened back then.

6 **THE COURT:** Now you're conflating two concepts.
7 You're -- the issue of whether any witness has personal
8 knowledge is always relevant, and particularly with regard to
9 lay witnesses. The fact that somebody doesn't have personal
10 knowledge to what they testify to doesn't automatically convert
11 them into an expert; it just means they're not a competent
12 witness for that topic. And so I think, you know, with regard
13 to construction schedules, if somebody says, you know, we only
14 built on Tuesdays between what and what, --

15 **MR. MC COY:** Right.

16 **THE COURT:** -- that's a factual statement and it
17 certainly can be challenged in terms of, how do you know, you
18 weren't there or, you know, whatever. But those things to me
19 don't sound like expert witness opinions. Expert witness
20 opinion, we'll get into it more deeply when I talk about the
21 *Daubert* motions but, you know, an expert witness opinion is
22 some sort of specialized knowledge, whether it is scientific or
23 under *Kumho*, otherwise that a trier of fact needs a specialist
24 to tell them. Somebody simply walking in and saying, here in
25 our court we start at 8:30 and we get done at 5:00 and that's

1 the way we've always done it as far as I know, that's me making
2 a statement of fact. And you have every right to say, well,
3 how long you worked here, lady, you don't know, maybe 15 years
4 ago maybe they weren't doing it that way. That's your cross.
5 But that's not an expert witness; that's just me telling you
6 the fact of what I understand. So it seems to me that the best
7 way to handle Mr. Paulsen is he has not been tendered as an
8 expert, he's not being proposed to give expert testimony. If
9 Mr. McCoy or anybody else hears something come out of his mouth
10 at trial that concerns them that they're headed in that
11 direction, you make the objection at trial. There is no expert
12 witness report for him and so if that objection arises and I
13 believe that he's wandered into expert witness territory, I'll
14 sustain the objection.

15 **MR. MC COY:** Okay.

16 **THE COURT:** Okay? So does that then take care of
17 Docket Number 114, I think? We've got Mr. Crawford, we've got
18 Mr. Hentgen. Mr. Paulsen's going to testify as a lay witness;
19 and if any problems arise with regard to Mr. Paulsen, deal with
20 them at trial.

21 **MR. MC COY:** That's fine, Judge.

22 **THE COURT:** Okay.

23 **MR. MC COY:** That resolves the motion, yes.

24 **THE COURT:** Okay, thank you. So that takes care of
25 that one as well. And I think that then takes us to the actual

1 what I would consider actual *Daubert* motions. And those are:
2 Docket Number 15, which is the Plaintiffs' motion requesting
3 that I issue an order prohibiting any and all parties from
4 offering "any exposure" or "every exposure" testimony; Docket
5 Number 116, which is Pabst's motion to exclude Anderson, Brody,
6 and Staggs's testimony; Docket Number 118, Pabst's motion to
7 exclude Garza's reports, testimony, and so forth; Docket Number
8 120, Pabst's motion to join Sprinkmann's *Daubert* motions and
9 WEPCO's *Daubert* motions, and in particular that motion relates
10 to Dr. Ellis, Mr. Ahnert's personal physician; Docket Number
11 122, which is the motion of all of the Defendants to exclude
12 Mr. Garza's testimony to strike certain testimony of
13 Dr. Anderson, and then also to preclude testimony from
14 witnesses regarding asbestos content and some other issues. So
15 as I understand it, those are what I feel like kind of fall
16 into traditional *Daubert* motions. Any that I haven't listed
17 that you all think I should have?

18 **MR. MC COY:** None others for -- that the Plaintiff
19 knows of, Judge.

20 **THE COURT:** Okay, all right, thanks. Mr. McCoy, can
21 I ask you a question?

22 **MR. MC COY:** Sure.

23 **THE COURT:** Are you using our Wi-Fi or are you hooked
24 up to something else some kind of way?

25 **MR. MC COY:** I'm just using the Court Wi-Fi.

1 **THE COURT:** Yes, it works!

2 **MR. MC COY:** It does work.

3 **THE COURT:** I'm sorry, I'm on the IT committee and we
4 only got it up and running in the middle of December and I
5 haven't seen anybody use it yet. I will be happy to march back
6 and report that it works, thank you.

7 **MR. MC COY:** I don't --

8 **THE COURT:** I should have asked Mr. Rhoades but I
9 just saw Mr. McCoy looking at it so --

10 **MR. MC COY:** Didn't remember it from before but when
11 I opened up, I --

12 **THE COURT:** We didn't have it --

13 **MR. MC COY:** Yeah.

14 **THE COURT:** -- before, that's why you didn't
15 remember. We didn't have it. So, I'm sorry, that was a frolic
16 and detour but I'm --

17 **MR. MC COY:** State Court has had it for a while here.

18 **THE COURT:** Yes, we know. That's one of the reasons
19 we were somewhat mortified. But we were told that because of
20 the age of this building and the way it's set up, that it would
21 be difficult. And it was difficult, but we have it, it works.
22 Okay, --

23 **MR. MC COY:** I don't think the Northern District of
24 Illinois has it yet.

25 **THE COURT:** Oh, good, we beat Chicago.

1 **MR. MC COY:** Pretty frustrating.

2 **THE COURT:** And I can say that as a former Chicagoan.
3 Okay, Mr. Rhoades, anything that you think I've missed in terms
4 of the list of *Daubert* motions?

5 **MR. RHOADES:** No, I don't think so, Your Honor.

6 **THE COURT:** Okay, and Mr. Schumacher?

7 **MR. SCHUMACHER:** No, ma'am.

8 **THE COURT:** Okay. So I want to assure you all that I
9 have read and gone through the motions I think fairly
10 thoroughly. But if -- I wanted to give each of you an
11 opportunity if you wanted to address any last thoughts with
12 regard to the motions, then I'm happy to hear those now, and
13 then I'll -- assuming that those don't change my opinions very
14 much, I'll let you know what conclusions I've come to.
15 Mr. McCoy, any additional argument, either on your own motion
16 with regard to prohibiting the -- any or every exposure or with
17 regard to the Defendants' motions?

18 **MR. MC COY:** I've got some notes here.

19 **THE COURT:** Sure.

20 **MR. MC COY:** I think most of these are touched on in
21 the brief.

22 **THE COURT:** Okay.

23 **MR. MC COY:** But there's a couple here maybe that are
24 not. I know on this Garza, there was some reference to an
25 opinion of Judge Yamahiro's about Garza's partner who --

1 Garza's a certified industrial hygienist. The -- his partner
2 was not but his partner was found qualified. But the comment
3 that I had was that the publications in the report of Garza, he
4 has that general report that's about 50 pages or something, the
5 publications in there are all peer-reviewed publications.
6 There might be one or two exceptions but, I mean, otherwise
7 those are all peer-reviewed publications. And somehow that
8 wasn't picked up by Judge Yamahiro. But they are.

9 And the other thing is from a foundation standpoint,
10 if there's questions about an expert, I -- that Your Honor has,
11 I would like to address any specific questions about that
12 because you may have some very specific things. The -- as a
13 general matter here, I would say, first off, you know, that the
14 primary dispute is over dose and exposure, and that as we
15 pointed out in the affidavit, especially of Dr. Anderson that
16 was done specifically for *Daubert*, because the depositions were
17 not *Daubert* depositions. In a *Daubert* deposition, you lay out
18 all the foundation for witnesses' testimony. But these were
19 not *Daubert* depositions and so they weren't done in that manner
20 where we laid out the expert's testimony and foundation. So
21 basically you just get soundbites of defense cross. But the
22 primary basis for knowing that you have sufficient dose and
23 causation -- I apologize if I look up and down here, Judge, --

24 **THE COURT:** That's okay.

25 **MR. MC COY:** -- because I've got these -- I couldn't

1 wear my contact lenses today because I've got an eye infection
2 so --

3 **THE COURT:** No worries.

4 **MR. MC COY:** -- but I -- so I keep having to lift up
5 and down from the bifocals to see you and down here to see my
6 paper so --

7 **THE COURT:** You can feel free to just --

8 **MR. MC COY:** Right.

9 **THE COURT:** -- look at your papers.

10 **MR. MC COY:** I'm used to --

11 **THE COURT:** I'm not that interesting.

12 **MR. MC COY:** Right, I'm used to being able to make
13 better eye contact. But the basis is that the literature that
14 produces the information that creates the ability to draw
15 causation inferences in the experts, that literature is about
16 activities and jobs and how long the people had these things.
17 And there's not literature that says, okay, if -- or that here
18 is the measurement of asbestos in the air that this worker
19 breathed and, therefore, this -- that makes a causal opinion.
20 That literature, I mean, I have trouble even thinking of any
21 situation like that in the literature. I couldn't come up with
22 one. But that's in essence what the defense is asking to do;
23 whereas the literature bases the causation connections on the
24 activities, like being a pipefitter or working at WEPCO or
25 working with thermal insulation where -- or working with

1 gaskets. That's how these things are determined. Now -- in
2 terms of the experts and their drawing connections. Because
3 there are separate publications that do measure like the
4 release of asbestos fibers from gasket removal activities or
5 from thermal insulation, but that's a separate publication
6 where you don't even draw a causation to a particular
7 individual, it just reports here's the numbers from these
8 activities. And there's a few of those studies out there that
9 the experts all utilize. I mean, for the most part, it --
10 there weren't measurements taken back in the days when these --
11 work took place like Ahnert's work in the fifties and sixties
12 and seventies, there wasn't any measurements. But there was a
13 couple studies that did pick up some measurements, so those are
14 what the experts know about. So, I mean -- but, again, knowing
15 that there is a particular measurement and therefore you have
16 causation isn't something that's published in the literature.
17 It's based on these activities and these types of products and
18 the time periods, which for mesothelioma are very short. I
19 think Dr. Anderson says the reports are a day of exposure can
20 cause mesothelioma in his affidavit on dose and causation. And
21 so you have very short periods of duration to cause
22 mesothelioma. But that's -- that I think is an important
23 concept, and that's in part also important because when you get
24 down to the question of the dose, what reaches the target organ
25 in asbestos, as Dr. Anderson again explains in his affidavit,

1 no one will ever know that because in each individual it's so
2 variable. When the fibers enter the breathing zone and they're
3 inhaled, that's not what goes to the target organ because the
4 body has so many defense mechanisms that only a small portion
5 of those fibers, unknown portion in each individual, will
6 actually reach the target area of like mesothelioma, which
7 would be the lung lining and the -- for asbestosis, which
8 Ahnert also was diagnosed with that. That would be pretty much
9 any place in the lower part of the lung usually. But how many
10 fibers that are inhaled actually penetrate into those areas,
11 you can never know. We do know, though, that in each of these
12 situations where you have that kind of activity like Ahnert did
13 where there's removal of thermal insulation -- "thermal
14 insulation" meaning the block or the pipe covering that goes on
15 the surfaces that are the heated steam piping or equipment that
16 gets very hot -- that those situations generate millions of
17 fibers being released if you just, you know, cut it, hit it
18 with a hammer, whatever. Gasket removal generates essentially
19 the same very high level of fibers, "gaskets" being the seals
20 that are on the pipes when they're put together or when they're
21 connected to equipment. So what you have is very typical
22 activities by Ahnert that create his exposure or his dose that
23 is dealt with in the literature as being the types of
24 activities that will cause mesothelioma. And for his trade,
25 some of the -- there are some studies even of pipefitters.

1 But more importantly really is that it's these types
2 of products, and you have the bystander situations and you have
3 situations where he's directly involved because he's actually
4 having to -- typically when a pipefitter removes a gasket from
5 the pipe, they'll have to take off -- I mean, I'm sorry, a
6 valve from a pipe, because these valves are pretty big valves,
7 some of them can be a foot or more in size. But they'll have
8 to take off insulation on either side of the pipe that connects
9 to the valve to get into that valve and be able to work on it.
10 So they're removing some insulation. And those exposures are
11 very, very high, and that's, as I say, reported in the
12 literature that that's a lot of asbestos. But, again, the
13 studies that are creating causation are based on these
14 activities and participating in them, and that's how the
15 literature reports on this. And as I say, that's explained in
16 Dr. Anderson's dose affidavit. That was written specifically
17 really for the *Daubert* scenario here, so that one does really
18 get right into the questions on *Daubert*.

19 But these -- the knowledge of these types of
20 scenarios is something that essentially all the experts, Ken
21 Garza, who's the industrial hygienist, Henry Anderson,
22 Dr. Anderson, who's the occupational and environmental medical
23 doctor from Madison, used to be the State's chief medical
24 officer for 30 years but he just retired last year, and also
25 Dr. Staggs, who's a pathologist, they all are working off of

1 this same body of literature that I'm talking about. And I
2 suppose the other component to the dose analysis -- well, it's
3 one of several because Dr. Anderson's affidavit really talks
4 about multiple components for dose and causation that they look
5 at, but a big -- another component of that is the
6 epidemiological literature which says, you know, in this group
7 of people doing these types of activities, there's a much
8 higher incidence of asbestos-related disease or mesothelioma.
9 So that's another basis for drawing these causal connections.
10 But I don't know how much -- I don't think Your Honor had had a
11 lot of asbestos experience before, and that's one of the
12 reasons why we laid this out.

13 See what else I had here. So originally there was
14 opinions essentially that, you know, all these exposures are
15 significant from an industrial hygiene standpoint or that each
16 exposure is a -- considered a cause. And, again, we're not
17 talking about one fiber in their thinking. But then we had
18 that series of cases that came out in the last few years that
19 said, well, that's not a sufficient enough basis to opine on
20 dose and causation. So instead we've now just taken the
21 exposures that we know now today are left in this case for
22 these Defendants and taken each of those exposures. So if
23 every exposure's a cause, now we're -- now we just created a
24 hypothetical with the specific facts that looks like what we're
25 going to essentially prove at trial. And that's the basis for

1 the -- those assumptions, or the basis for the opinions, those
2 hypothetical assumptions. And that's how the experts testify
3 at trial. And we've -- we presented that in the depositions,
4 again taking what we all knew as the facts because essentially
5 it's the same thing we had for summary judgment in these cases,
6 and applying -- instead of saying, oh, each of these exposures,
7 we said, now, okay, let's assume these specific ones that we're
8 talking about and narrow the opinions down to those. And
9 that's what we did.

10 See if there's anything else I should add. Again,
11 Your Honor, if you have specific questions, please ask me;
12 because as I say, we didn't specifically take *Daubert*
13 depositions in this case so I think we've got enough
14 information from other testimony, we can answer any
15 foundational questions.

16 **THE COURT:** Okay, thank you, Mr. McCoy. Mr. Rhoades?

17 **MR. RHOADES:** Your Honor, I think the way we decided
18 to deal with this is that I would kind of take the point on the
19 Garza IH-type motions.

20 **THE COURT:** Right.

21 **MR. RHOADES:** And so I will talk briefly about those.
22 I don't want to add to a record that you don't need added to.
23 But, you know, part of the challenge with this motion was that
24 Mr. Garza was deposed and it wasn't titled "*Daubert*
25 deposition," or whatever we think it should have been titled,

1 but he had produced a report, we deposed him essentially on the
2 report. I think that's typically how it goes and I'm not sure
3 we need an extra deposition to deal with *Daubert* issues. The
4 report is essentially a cut-and-paste report that has been
5 submitted in hundreds of asbestos cases. In fact, I apologize
6 for having -- for sending you the *Moan* (phonetic) materials. I
7 thought it might be instructive to you. I always go back and
8 forth about whether to dump one court's work on another that's
9 not directly controlling. But given the fact that we have
10 wrestled with these issues, that it was essentially an
11 identical report from the same folks, and the challenge was
12 essentially the same, I thought it might be instructive. And
13 when I say an "identical report," I mean even to the opinions
14 being a word-for-word identical, other than the name change.
15 And so, you know, the issue that we have is typically, and what
16 we've kind of argued about in the other case, is that these
17 gentlemen have gotten together and put together what they deem
18 a comprehensive literature review that deals with as many
19 aspects that they could think of as these cases as they could,
20 and then they kind of take whatever they glean from each
21 individual case and they apply it to the report and they come
22 out with their conclusions. Our problem with their methodology
23 is that they, both of them, have cited to this De Nardi
24 (phonetic) text as the kind of blueprint for how to do these
25 things. And I have the four chapters, I've read them as many

1 times as a layperson can read this stuff, and I think I
2 understand the procedure, but it essentially involves
3 collecting data and then analyzing the data. And, you know, in
4 particular, what seems to be important to Mr. Garza is, "A,"
5 there are some witnesses that saw visible dust and so there are
6 a group of publications that tell me visible test equals "X"
7 million particles per cubic centimeter. And so what I did was
8 I looked a little bit more closely at the report about those
9 studies, and that's section five of their report which is your
10 doc. number 178-2 of your -- and so what the discussion and the
11 citations about visible dust refer essentially to what section
12 five of that report, which is on page eight. And to
13 Mr. McCoy's comment earlier about the peer-reviewed nature of
14 these articles, the first article cited there for the
15 proposition that dust contains a certain number of million
16 fibers per cubic centimeter is a deposition of a plaintiff's
17 expert in another asbestos case, Demet (phonetic) deposition,
18 February, 1998; hardly peer-reviewed. The second article is
19 entitled "Calidria 1968." It is a marketing publication put
20 out by Union Carbide, which I have a copy of. It contains a
21 reference to what general dust looks like in terms of numbers
22 of particles. It doesn't say anything about asbestos or non-
23 asbestos or what the content was or anything else, and it
24 certainly doesn't have any citation to any methodology used to
25 reach those numbers. And, you know, there are several other

1 citations in this as well that cite to different articles for
2 particular propositions. There's a citation to a Dodson study,
3 which is a peer-reviewed study. It's entitled "Asbestos Risk
4 Assessment Epidemiology and Health Effects." But if you look
5 at the actual proposition that this article is cited for, it --
6 to another article, which I wasn't able to find unfortunately,
7 authored by someone named Hemeon (phonetic) that contains
8 Mr. Hemeon's conclusions about what dust looks like in terms of
9 the number of particles in different lighting conditions, but
10 also doesn't contain any reference to a methodology that I
11 assume somebody who was in the business of quantifying these
12 things might be interested in before formulating an opinion.

13 We asked Mr. Garza which of these articles did you
14 use to reach your numbers. And his response essentially was,
15 boy, it'd be really hard for me to pick one out, pretty much
16 all of them. It makes it difficult for us to challenge that
17 because there are, as you know, several hundred articles that
18 are cited in his report. Now, I've highlighted a few for you
19 that don't appear to be the type of information that a
20 scientist might rely on if he were doing work for somebody and
21 getting paid for his scientific work, which I think is the
22 standard we'd like to hold these experts to. And so, you know,
23 there -- the other big area, and I don't want to -- I'll shut
24 up in a second.

25 The other big area is the thermal systems insulation,

1 which obviously my client is concerned about and both of us are
2 in these cases. You know, one of the big articles is the Brown
3 article that's cited to. You know, the Brown article, and
4 there was an argument in the other court that it was peer-
5 reviewed. It's actually a speech that was given by someone
6 that was transcribed and put down in a journal. It's not a
7 peer-reviewed article. And so, you know, to the extent that we
8 are able to try to defend these claims, what we want is some
9 connection between what the evidence is in the case and what
10 the peer review, the process is that you're using to make the
11 connection to formulate your opinion. And that's absent in
12 this case because Mr. Garza wasn't able to make that connection
13 for us.

14 There are other issues with the methodology, you
15 know, that I think we briefed but, I mean, he didn't really do
16 anything other than read deposition testimony and try and use
17 his basic knowledge that he collected over the years to
18 scribble down some numbers about what exposures he thought were
19 important. But one thing I did want to point out is one of his
20 conclusions, and perhaps the most important one with respect to
21 this case and these cases, is opinion "B." This is Document 71
22 in the '13 case, I apologize.

23 **THE COURT:** Yeah, unfortunately I've been looking at
24 the '10 docket. But that's okay, I can go back and find
25 something if I need.

1 **MR. RHOADES:** I'm sorry, 178-2 in the '10 case.

2 **THE COURT:** Hold on a second. Really? Because the
3 last docket entry I have in the '10 case is 145 so --

4 **MR. RHOADES:** I'm looking at a file-stamped copy and
5 I have one on the computer that we submitted as an exhibit. It
6 has a 2-10-cv-67443 (indisc.) stamp on it filed 8/13/12. In
7 any event, it's the same report we've been looking at.

8 **THE COURT:** Yeah, there's nothing filed on that date
9 in the 2010 case so I don't know if somehow we -- I just -- I
10 may have the '10 docket open, but it's okay. It's --

11 **MR. RHOADES:** It's page -- it's the -- it's opinion
12 "B" of the opinion section, which is section four. And the
13 opinion is: "Significant exposure to asbestos includes" and
14 then a series of activities "in such a manner that airborne
15 asbestos fiber concentration is released above background
16 concentration." That's an opinion that they've offered. But
17 there's nothing in their work that supports that opinion or
18 tells us how much over. Is it anything over background? Is it
19 -- and this is what industrial hygienists are supposed to do is
20 categorize these things. And so this is the challenge here
21 that we have, right? We have all these historical studies that
22 say, you know, this activity does this and that activity does
23 that. And then we have current practitioners who opine that
24 anything over what some governing body has determined is a
25 background level is a significant exposure and should become or

1 be able to become the foundation for a viable claim in these
2 cases. And there's no real connective tissue between those
3 propositions. And so I guess that's kind of a nutshell of the
4 challenge to Mr. Garza offering his opinions in this cases.

5 **THE COURT:** Thank you, Mr. Rhoades. And then
6 Mr. Schumacher's going to take the rest of it; is that right?
7 Am I understanding --

8 **MR. SCHUMACHER:** Well, I'm going to piggyback just a
9 little bit --

10 **THE COURT:** Okay.

11 **MR. SCHUMACHER:** -- on what Mr. Rhoades had to say,
12 and I'll just stick with Mr. Garza since we started there. And
13 then I'm going to talk a little bit --

14 **THE COURT:** About the doctors.

15 **MR. SCHUMACHER:** -- about the other -- the doctors,
16 yes. So in addition to I think Mr. Rhoades referred to it as
17 the connective tissue that's lacking in this particular
18 instance with Mr. Garza's proposed testimony or in response to
19 hypotheticals, is in specific regard to Pabst, the fact that
20 Mr. Garza candidly acknowledges that at no time has he received
21 any information tying anything that he might talk about to
22 Pabst, other than simply a bullet point that says Plaintiff
23 worked at some unknown time at Pabst Milwaukee, unknown
24 location, unknown time, unknown place in the plant, unknown
25 what Plaintiff did, what Plaintiff encountered; and, as a

1 result of that, suddenly relied on testimony from just a
2 complete different case with a complete different plaintiff and
3 a complete different set of facts and is now extrapolating that
4 to Pabst. I think, you know, again, to borrow Mr. Rhoades's
5 phrase, if we're talking about connective tissue, you know,
6 we're so far afield of any possible connection to Pabst with
7 any then-industrial hygiene opinions of exposure of the type
8 that Mr. Rhoades just discussed with regard to Pabst that I
9 don't know how we defend against that fundamentally, because
10 we're asked to simply imagine that a different plaintiff in a
11 different lawsuit with a different set of facts and experiences
12 should just be grafted on to this one. That's all I'm going to
13 say about Mr. Garza. I don't think there's any reason to move
14 forward.

15 With regard to the doctors, what I'm hearing Your
16 Honor say is, you know, take the handwritten, single-spaced,
17 you know, sort of outline of presentation and sort of just put
18 that aside, Your Honor's read the papers. So I want to --

19 **THE COURT:** You can read me the single-spaced if you
20 want to.

21 **MR. SCHUMACHER:** No, no, no. I'm not dying to do it.

22 **THE COURT:** Okay, all right.

23 **MR. SCHUMACHER:** I think there's a couple of
24 particular issues though that I'd like to bring up to highlight
25 sort of some issues that we brought forward in our papers. One

1 of them is sort of an aside. It's an argument that was made in
2 Plaintiffs' opposition that -- just because I don't want it to
3 -- I'm not sure where it comes from, but just the notion that
4 somehow a *Daubert* motion is a dispositive motion. We noted in
5 the opposition, our papers, that a *Daubert* motion fundamentally
6 by definition is not a dispositive motion. But since the
7 filing of our paper, I actually found a couple of cases that
8 point blank note that a *Daubert* motion is not a dispositive
9 motion. And I'll quote for instance from Government Employee's
10 Insurance Company, which I think that's the fancy name for
11 GEICO, v. KJ Chiropractic Center out of the Middle District of
12 Florida where the court -- I guess this particular argument was
13 advanced and the court specifically noted, and I quote: "A
14 *Daubert* motion is not a summary judgment motion, motion to
15 dismiss, or other motion that purports to resolve a claim. It
16 is a motion to exclude expert evidence pursuant to Federal Rule
17 of Evidence 702. As such, it is not a dispositive motion." I
18 just think that should be made clear that, you know, a motion
19 to limit or strike an expert's testimony is not a motion on the
20 ruling of the merits of the case, which is what a dispositive
21 motion does.

22 If we move specifically to the doctor experts, and I
23 guess I'm going to concentrate -- I think we have agreement.
24 I'm not going to say that I'm a hundred percent sure that we
25 have agreement with regard to Dr. Brody, that he is not

1 offering -- or he's not being proffered to offer a specific
2 causation opinion.

3 **THE COURT:** That -- I actually have that in my notes.

4 **MR. SCHUMACHER:** Okay.

5 **MR. MC COY:** That's correct.

6 **MR. SCHUMACHER:** And that's fine, because what we are
7 challenging is not general causation. We're challenging
8 specific causation; because what doctors Brody, Dr. Staggs,
9 Dr. Anderson, what they have all offered are general causation
10 reports that the Plaintiff then seeks to graft into a specific
11 causation opinion. And we can use whatever nomenclature we'd
12 like to use for this. We can call it "each and every" or
13 "single fiber" or "cumulative exposure" or, you know, I'm sure
14 if I started going through various opinions of various courts
15 and various expert reports, I would find half a dozen more, you
16 know, versions of phraseology for what we're going to call
17 this. But fundamentally, almost every Federal Court that has
18 looked at opinions like these, including specifically some of
19 Dr. Anderson's opinions, have found that they're all
20 functionally the same thing; and that the issue is not simply
21 one of dose and exposure, although those are part of it, it's
22 really every single factor of the *Daubert* rubric of the Court's
23 gatekeeping function. It's a methodology that can't be tested.
24 It has no error rate. It -- I mean, fundamentally, this
25 methodology will always -- if you plug in a couple of key

1 factors, which is a sick plaintiff with alleged asbestos
2 exposure with this methodology, you will always get equals
3 specific causation to whatever the product or the premises is
4 that you're going to talk about. And I think the -- I mean, I
5 think it's fairly obvious that the most seminal case we've got
6 to look at based on where we're sitting today is the Seventh
7 Circuit's recent *Krik* (phonetic) opinion. You know, it was
8 interesting because in the *Krik* opinion at page 676,
9 plaintiff's counsel specifically noted -- and this is actually
10 quoted, this is a transcript from the argument before the
11 Northern District of Illinois that the Seventh Circuit is
12 quoting -- where the plaintiff's counsel specifically notes:
13 "That's right. That's how" in this case "Dr. Frank would say
14 any exposure. All exposures contribute." This is functionally
15 what Mr. McCoy just said 25 minutes ago when he was referring I
16 think at the time to Dr. Anderson. And if we look to, you
17 know, the *Krik* opinion and where the court sort of laid out a
18 variety of bullets that are specifically referenced in Pabst's
19 papers -- I'm sorry I don't have it. It's always I have too
20 many papers in front of me at once. Several direct quotes from
21 the Seventh Circuit's opinion, most of them are at page 675.
22 One of them's at page 677. I'm not going to read them to Your
23 Honor because they're already in our papers. And I don't think
24 Your Honor would want me to do this, but with each one of these
25 quotes, and I'll just take the first one, *Krik*'s experts

1 "readily admitted in in their depositions that they had not
2 considered any information about the amount of exposure in
3 their analysis." With each one of these bullet points, I can,
4 right in front of me if Your Honor wants to, pull out each one
5 of, in this case Dr. Staggs's and Dr. Anderson's, deposition
6 testimony and match up almost as though they read this and
7 said, well, that's what I need to say, except that that's what
8 I don't want to say, where they are explicitly matching each
9 one of these bullets that the Seventh Circuit -- that the
10 Northern District of Illinois found objectionable that the
11 Seventh Circuit heartily agreed with. I'm not going to do that
12 unless Your Honor actually wants me to pull them out. I didn't
13 think so.

14 **THE COURT:** Okay.

15 **MR. SCHUMACHER:** So, you know, moving beyond that,
16 the -- each one of these reports with Dr. Staggs and
17 Dr. Anderson, and each part of their testimony -- and once
18 again, I'm not really -- I'll confess, I'm not really quite
19 sure the notion of a *Daubert* deposition versus a non-*Daubert*
20 deposition. The purpose of the depositions was to explore the
21 experts' opinions with -- and what they are. That's what we
22 did. We explored the experts' opinions and they were -- they -
23 - we assume they testified so to what their opinions are,
24 except that there's this notion that, well, we're going to have
25 different opinions that you don't get to know about right now

1 in the form of all these, you know, convoluted hypotheticals
2 that we're going to create. But fundamentally, at the end of
3 the day, the hypothetical is still going to come down to was
4 there asbestos exposure, is it represented to me that it's
5 something above background, whatever that means because the
6 experts can't defined it -- define it, and if so, ergo equals
7 specific causation. That's simply not -- that's not a
8 scientific methodology. It doesn't pass muster under *Daubert*,
9 under *Kumho*, under its progeny, and certainly not under just,
10 you know, whatever it was three months ago, the *Krik* decision.

11 And then finally -- and I'm going to shut up real
12 soon, too. Every lawyer's famous last words.

13 **THE COURT:** No, "I'll be brief, Your Honor," is every
14 lawyer's famous --

15 **MR. SCHUMACHER:** I suppose that's the more gentile
16 way to say it.

17 **THE COURT:** I've said it myself plenty of times so
18 it's okay.

19 **MR. SCHUMACHER:** So I think there's another notion,
20 and that is that because Dr. Staggs and Dr. Anderson's reports
21 are general in nature, the fact that they're suddenly going to
22 talk about specific causation when they didn't issue a report
23 on specific causation, couldn't particularly discuss specific
24 causation except to say, well, if you tell me there was
25 asbestos there, then I'm going to say there's specific

1 causation, I would argue the reports also don't pass muster
2 under, you know, Rules 37 and 26. And interestingly enough,
3 this is sort of what Mr. McCoy was just talking about with --
4 I'm sorry, I'm blank.

5 **THE COURT:** Mr. Paulsen.

6 **MR. SCHUMACHER:** Yes, thank you. And, you know, with
7 regard to Dr. Anderson, Dr. Staggs, they don't provide any
8 information for which to bind them to their opinions with
9 regard to specific causation because their opinions by
10 definition are totally and wholly general in nature. And it's
11 too late on litigation that's been around since 2010 and 2013
12 to suddenly try to cure that now, as I think Plaintiff is
13 trying to do with this affidavit, but which I would still argue
14 does not pass any muster. It's really not changing any of the
15 opinions, it's just using different nomenclature in 2017 and --
16 or 2018 now. Sorry, we're still at that point where my mind
17 hasn't caught up.

18 **THE COURT:** Mine will sometime in June.

19 **MR. SCHUMACHER:** So with that being said, I have one
20 other point. And it has escaped me. Probably wasn't that
21 important anyway.

22 **THE COURT:** Three o'clock in the morning it'll come
23 to you. Okay, thank you, Mr. Schumacher. Mr. McCoy, I'll turn
24 back to you just for the -- if you have any last words with
25 regards to these arguments, not last words period.

1 **MR. MC COY:** Right. Yeah, the *Krik* opinion was one
2 of judicial discretion. It said based on whatever record they
3 had in that case. So the record here is far more fleshed out
4 about the basis for expert causation opinions and it's not just
5 this -- it's not the statement that every exposure is a cause.
6 That's not the basis for the opinions. It's the factors listed
7 in Dr. Anderson's testimony and in his affidavit that was
8 submitted specifically for *Daubert*. And, of course, when you
9 get down to *Daubert*, you're talking about not necessarily what
10 the jury's going to hear but about the proper foundation. So
11 to provide additional information for a *Daubert* hearing, under
12 Rule -- I believe it's 104, that wouldn't necessarily be
13 submitted to the jury is proper to provide additional
14 foundation. And that's what's been done with Dr. Anderson's
15 affidavit. So there's all these different factors in there
16 that aren't anything about what was discussed in the *Krik* case,
17 which only had to do with this one conclusory issue about every
18 exposure or being a part of the cumulative and that being the
19 only basis for the opinions. All these bases (sic) are laid
20 out here in Your Honor's record that aren't discussed in the
21 *Krik* opinion and weren't in that record.

22 The other thing is Ken Garza's report essentially
23 lays out exactly the same thing in his general report where he
24 talks about all these different factors that go into evaluating
25 the significance of the exposures. He's not saying that

1 there's any certain amount of exposure because, again, that
2 couldn't be said for the very reasons that we talked about,
3 that you don't know day-by-day what exactly Ahnert's work was
4 and what the measurements were. There were none taken. And
5 all you know is that he had this job, and in the literature
6 these types of jobs were reported as having these types of
7 exposures when you're using these types of products. So,
8 again, you're just talking about very common situations that
9 come up over and over and over again. And that's one of the
10 reasons why his opinion is just based on the fact that there's
11 so much literature about studying thermal insulation and
12 studying gaskets. So it's a very different record that *Krik*.

13 And, again, we specifically have said in our
14 briefing, we're not going to offer this every exposure opinion,
15 and that the reason for it was, again, because we don't want
16 Your Honor to have to be bothered with that argument. It's
17 just -- it's not worth it because we have all of these other
18 bases and reasons that have been laid out as to why these
19 particular exposures, scenarios that we've known since the
20 summary judgment motions and the depositions for Ahnert, are
21 ones that would be causes of his condition or would be
22 significant exposures.

23 He's not offering a specific -- none of our witnesses
24 are offering a specific opinion about Pabst. I heard some
25 comment about that. And that's very true. They're only

1 offering opinions about the conditions that will be testified
2 to about Pabst, but they're not witnesses to the Pabst brewery
3 itself. They're only taking the facts that are being provided
4 through these hypotheticals and opining based on those. So
5 there's no specific opinion that Pabst -- the conditions at
6 Pabst were dangerous and a cause of his disease. Nobody's
7 going to say that. I think we laid out the opinions in the
8 hypotheticals. But they will say that a period of two weeks
9 doing these activities with gaskets or thermal insulation,
10 whatever it is, specific that other witnesses say about WEPCO
11 and about Pabst, that those are either significant from an
12 industrial hygiene standpoint, meaning above background, or
13 from a medical standpoint, they're a cause. So they're limited
14 in that way. Nobody's giving an opinion about WEPCO, nobody's
15 giving an opinion about Pabst; just about the activities that
16 occurred at those places.

17 There was also some mention about industrial hygiene
18 methodology, but I don't -- there's nothing unique here about
19 any of the procedures that Garza's following or methods that
20 he's following in assessing asbestos exposures. I think we
21 made it clear in our brief that he's using exactly the same
22 basis in assessing these exposures and that that exposure
23 methodology that he uses repeatedly, and he said so in his
24 deposition. But he doesn't go out there and have somebody at a
25 job site disturb the asbestos and go out there and measure it.

1 That's not how -- that's not how it works. You probably -- you
2 couldn't even do that. And so instead you have to rely on the
3 reports and the literature about these activities and the
4 conduct and the fact that there is visible dust is one element,
5 but it's not necessary because most all of the asbestos is
6 invisible. So instead you deal with these situations where you
7 have the activity of disturbing this thermal insulation or
8 removing this gasket and then that activity is known to produce
9 significant amounts of fibers. So he's -- he's assessing it in
10 that way, the way he would do it in any place.

11 And these -- again these are very common types of
12 products, there's nothing unique about this, you know, when you
13 talk about the gaskets and thermal insulation. In his report
14 he's got whole big sections of those, and that's coupled with
15 the basic industrial hygiene concepts of asbestos, or
16 principles of asbestos, I should say, those principles being
17 that these fibers, once they get up into the air they become
18 invisible and they travel for great distances, they can travel
19 for miles. And they -- and even when they settle out then
20 they'll stay in the air for days. But when they settle out,
21 importantly, they're very easily kicked back up in the air.
22 So, again, those are factors that he's considering in his
23 assessment of these types of products and these types of
24 activities. But there's no one unique methodology that -- that
25 you have that says you have to have a measurement to make an

1 industrial hygiene assessment, you have to have a measured
2 amount of exposure or you have to do something, sort of those
3 reconstruction that -- that's, as I say, basically not possible
4 for a particular individual because you can't -- you don't have
5 any data, you don't have a video of what happened on that day
6 or each day that he was exposed at WEPCO, we don't have that,
7 that kind of data to make that kind of reconstruction. Instead
8 you have knowledge of these activities based on what the co-
9 workers remember and WEPCO didn't document any of this so we're
10 stuck with what the co-workers remember which is, you know,
11 back 40 years ago they weren't thinking about asbestos
12 exposures, it wasn't a concern to them, obviously. They were
13 out there doing their jobs so when they testify now they have
14 only limited recall of these situations, but that recall is
15 sufficient to fit into the pattern of the literature that these
16 activities performed in these normal and customary ways are
17 going to create significant exposures or are going to be the
18 source of medical causation.

19 So I think that, again, these are spelled out in our
20 briefing that these are all the different bases and I won't go
21 into it any further, I think I've covered it, unless Your Honor
22 has a question.

23 **THE COURT:** Thank you, Mr. McCoy.

24 And thank you all for your arguments.

25 **MR. SCHUMACHER:** Your Honor, if I may before we go

1 any further?

2 **THE COURT:** Sure.

3 **MR. SCHUMACHER:** What I wanted to -- not responding
4 to Mr. McCoy, tell you that I remembered my thought --

5 **THE COURT:** Oh, good.

6 **MR. SCHUMACHER:** -- if I could get it out.

7 **THE COURT:** That's quicker than I would have
8 remembered it.

9 **MR. SCHUMACHER:** I knew as soon as he started talking
10 that it was going to come to me.

11 I actually just wanted to address -- I don't want to
12 address them all, but I also think it's important to address
13 some of the case law that the Plaintiffs cited in opposition to
14 our Briefs and how inapposite it really is. And I'll call out
15 a couple in particular.

16 The Plaintiff relied on the Milward case from the
17 First Circuit in arguing that his expert's methodology was
18 appropriate and met the Daubert standard, but once again
19 Milward actually fits perfectly within the framework of what
20 we're referring to. Specifically Milward is a First Circuit
21 case where the First Circuit reversed the District Court which
22 had excluded expert testimony.

23 The expert in the District Court was making a general
24 causation opinion overall that exposure to benzene could cause
25 a form of leukemia, that's all the expert was saying, and the

1 District Court excluded that. And the First Circuit determined
2 that based what had occurred that the record that the experts
3 methodologies, you know, all of the factors for *Daubert* had
4 been met to issue that general causation opinion.

5 Once again the First Circuit explicitly noted they
6 weren't touching specific causation; they were not saying that
7 Company A's allegedly benzene-containing product caused
8 Plaintiff's alleged leukemia, those -- they're just
9 fundamentally different things.

10 And another one that Plaintiff cites is the Ross case
11 which is a Pennsylvania Supreme Court case. I'm probably safe
12 in saying I'm the only person in the room who's actually a
13 Pennsylvania lawyer and I'm very familiar with this case --

14 **THE COURT:** Speaking for myself you're right.

15 **MR. SCHUMACHER:** -- and I'm very familiar with this
16 case and the Pennsylvania Supreme Court explicitly noted in the
17 Opinion that they were rejecting the every exposure opinion.

18 Now Pennsylvania operates on a Frye standard, it's a
19 little bit different, but while they upheld or while they noted
20 that the expert's testimony met the muster of *Frye* in a case
21 where there was well-documented fiber exposure years of between
22 45 to 100 fiber per cc exposure years, which we don't have any
23 of that in this case, they determined that there was -- there
24 was sufficient data, the data that doesn't exist in this case,
25 to determine that the expert met the *Frye* standard. Again,

1 it's just a -- it's a very different thing than what we're
2 talking about here.

3 That's all I was going to say with regard to my --

4 **THE COURT:** Escaped thoughts.

5 **MR. SCHUMACHER:** -- missing my escaped thoughts. I
6 could certainly respond to Mr. McCoy, but I don't think that's
7 what Your Honor wants so I will stop there.

8 **THE COURT:** Okay.

9 **MR. MC COY:** And there is no minimum fiber year level
10 for mesothelioma.

11 **THE COURT:** Okay, but I don't think that's what the
12 argument was, but --

13 **MR. MC COY:** That doesn't exist.

14 **THE COURT:** All right, thank you all.

15 So let me -- I'll take these a bit at a time and I'm
16 going to start with Docket Number 114 which is the Plaintiff's
17 Motion, and that's a Motion for an Order excluding any exposure
18 or every exposure testimony.

19 This was filed as a *Daubert* Motion. It is not what I
20 consider to be a traditional *Daubert* Motion because -- and,
21 again, I guess my opinion doesn't really matter, but a *Daubert*
22 motion usually is a motion that says:

23 "This particular person is either not qualified to be
24 an expert or isn't qualified to be an expert on a
25 topic that would be of assistance to the trier of

1 fact or does not use the methodology that is reliable
2 and repeatable," if you will.

3 And I'll go over that standard in a minute.

4 What this Motion, as I read it, Docket 114, seeks is
5 an Order from me instructing all parties that no one can put a
6 witness on the stand and then elicit from that expert witness
7 testimony about the any exposure theory or the testimony about
8 the every exposure theory. And basically what the Motion
9 really seems to be is a stipulation from Mrs. Ahnert where she
10 says "I'm telling you I won't do that, guys, and since I'm
11 telling you I won't do that you should agree that you won't do
12 it either, and if we're all in agreement then -- then we're
13 good."

14 I -- I appreciate the thought, I think, but the
15 reality is as Mr. Schumacher said that what's being proposed
16 here is that I issue an Order telling people to abide by
17 Seventh Circuit law, and I'm not sure that I need to tell
18 anybody to do that, the Seventh Circuit has already done it.

19 The -- I suspect that this Motion was, in some
20 respect, in anticipation of or a response to *Krik*, and I'll
21 just briefly go over *Krik*. As you all know it's *Krik versus*
22 *Exxon Mobil Corporation*, 870 F3d 668, it was decided last year
23 by the Seventh Circuit.

24 In that case the Plaintiff in *Krik* was trying to
25 argue what it called a "cumulative" -- or what he called,

1 sorry, "a cumulative exposure theory," and kept hitting over
2 and over again on cumulative exposure. And the reason that the
3 Plaintiff, I think, probably emphasized so heavily that -- that
4 label was because the Plaintiff was aware that the any exposure
5 theory or the each and every exposure theory was not tenable in
6 the Seventh Circuit, and so that Plaintiff, and I don't mean in
7 any way to be dismissive, but creatively said "We're not
8 arguing those, we're arguing cumulative exposure."

9 The District Court in the Northern District decided,
10 first of all, that any exposure was not reliable enough for
11 specific causation and that each and every exposure was not
12 reliable enough for specific causation, and so in response to
13 that the Plaintiff said "Okay, we're going to call a cumulative
14 exposure expert."

15 The District Court said I don't see the difference,
16 it's another label for basically the any exposure or the each
17 and every exposure theory and suffers from the same flaws as
18 those theories do, which is that there is not, and I'm quoting
19 here:

20 "Cumulative exposure, any exposure, each and every
21 exposure, whatever you want to call it, is not tied
22 to the specific quantum of exposure attributable to
23 the Defendants, but instead was based on his medical"
24 -- the expert's "medical and scientific opinion that
25 every exposure is a substantial and contributing

1 factor to the cumulative exposure that causes
2 cancer."

3 That is a quote from *Krik* at Page 673.

4 And, of course, at the end of that case the jury
5 found that it was something other than exposure that caused
6 Mr. Krik's cancer.

7 On appeal in front of the Seventh Circuit Mr. Krik
8 argued that that was narrow on the District Court's part, that
9 they weren't the same thing.

10 The Seventh Circuit didn't agree. The Seventh
11 Circuit said that the cumulative exposure theory was "more of
12 the same," that *Krik* decision at Page 675. And I'll state
13 directly what *Krik* says:

14 "To summarize, the principle behind the each and
15 every exposure theory and the cumulative exposure
16 theory is the same, that it is impossible to
17 determine which particular exposure to carcinogens,
18 if any, called an illness -- caused an illness."

19 In other words, just like each and every exposure the
20 cumulative exposure theory does not rely on any particular dose
21 or exposure to asbestos, but rather to all exposures, that all
22 exposures contribute to a cumulative dose.

23 "The ultimate burden of proof on the element of
24 causation, however, remains on the Plaintiff
25 requiring a Defendant to exclude a potential cause of

1 illness, therefore, improperly shifts the burden to
2 the Defendants to disprove causation and nullifies
3 the requirements of the substantial factor test."

4 That is at Page 677 of *Krik*.

5 So I appreciate the fact that the Plaintiff is saying
6 "I promise that I won't elicit any testimony about any exposure
7 and I promise that I won't elicit any testimony about each and
8 every exposure."

9 I, under *Krik*, think that there should also be a
10 promise not to elicit any testimony about cumulative exposure
11 because the Seventh Circuit has said same difference, and the
12 Defense shouldn't be doing it either because *Krik* is Seventh
13 Circuit law and *Krik* says that those theories are not reliable
14 under *Daubert* and, therefore, can't form the basis for
15 causation.

16 So to the extent that I have to rule on the Motion
17 I'll grant it, but I think it's a little bit almost in the
18 sense of a -- of a nonevent because I'm simply saying by
19 granting that Motion that what the Seventh Circuit has said is
20 the law is the law and everyone should abide by what the
21 Seventh Circuit has said the law is.

22 When I was in Bankruptcy Court I once had a
23 bankruptcy attorney who asked me, he said "You know, this
24 particular Order doesn't say anything about Section 1114," and
25 the Plaintiff's lawyer looked at me and said "Judge, if you

1 want me to put a provision in the Order that says the
2 Bankruptcy Code says what the Bankruptcy Code says, I'm happy
3 to do that, it will save a lot of typing and we won't have to
4 retype the whole Code into the Order." And I don't mean to be
5 flip but that's a little bit what this feels like to me, I'm
6 issuing an Order saying there's a case that says this and the
7 Seventh Circuit has said you have to do it and so that's what
8 we're going to do. So I'll grant the Motion, but I think it's
9 in the for what it's worth category.

10 That comment, however, then I think takes us to the
11 more specific Motions, and I should emphasize again in granting
12 Docket 114 I'm also affirming that the burden still remains on
13 the Plaintiff to prove that it was exposure to either of these
14 Defendants' asbestos in either of these Defendants' locations
15 that caused the actual disease.

16 And that takes us to the second Motion, which is
17 Papst's Motion and employees in Sprinkmann and WEPCO's Motions
18 to strike certain of the expert's testimony.

19 I'm looking now at Docket Number 116 in the 2010
20 case, which is the Papst Motion, and at Docket Number 122 in
21 the 2010 case which is the Motion of the other Defendants.

22 And the starting place for that discussion now that
23 we're actually into the weeds of *Daubert* is to go over the
24 weeds of *Daubert*.

25 So what I understand that the Plaintiff has done is

1 to identify Dr. Anderson who as, as Mr. McCoy has indicated, is
2 a medical doctor and he formerly was the Chief Medical Officer
3 and State Epidemiologist for our version of OSHA, the State
4 version of OSHA in Wisconsin and is also a professor at UW;
5 Mr. Brody -- or Dr. Brody, who's not giving a specific
6 causation testimony and then Dr. Staggs.

7 And the purpose for calling, as I understand it, all
8 three of those individuals -- in fact, let me exclude
9 Dr. Brody, I don't think we really need to have a discussion
10 because we're going to be coming to a conclusion that will
11 apply to him, but will not serve to just -- to exclude his
12 testimony.

13 But the purpose for calling Anderson and Staggs is to
14 establish a causal link between exposure to asbestos from
15 either one of these Defendants or any one of these Defendants,
16 and the mesothelioma and the asbestosis that the coroner found
17 caused Mr. Ahnert's death.

18 By -- by its very terms, by the very definition of
19 the purpose for calling those experts the purpose for calling
20 them is to prove specific causation. And as to many of
21 Mr. McCoy's comments today and many of the things that he said
22 in his briefs I'm not entirely sure that anybody in this room
23 would disagree with many of them. Everyone knows and science
24 has proven that asbestos is a dangerous substance; that if it
25 gets into people's lungs it can cause all sorts of damage that

1 if you start off, it stays in the air and floats around and it
2 can stay there for a long time that -- as Mr. McCoy said we
3 don't have any idea how many of those fibers may actually make
4 their way from your nose down to your lungs to the portions of
5 your lungs where it can cause damage. I don't disagree with
6 any of that, I'm guessing probably most people don't disagree
7 with any of that. That's not the point of this lawsuit.

8 The point of this lawsuit is not to convince a jury
9 that asbestos is not a good thing. It's not to convince a jury
10 that exposure to asbestos is a bad thing. It's not to convince
11 a jury that people can get sick or die from exposure to
12 asbestos. The point of this lawsuit is to explain to a jury
13 how Papst or Sprinkmann or WEPCO provided exposure that
14 specifically caused Mr. Ahnert's illness that caused his death.
15 Because, otherwise, all we're doing is proving a general
16 principle. So in making the ruling that I am about to make I
17 am not disagreeing with any of the general propositions that
18 Mr. McCoy and the Plaintiff has made about generally the
19 science around asbestos and the science around the problems
20 that it can cause medically.

21 Now let me turn to the *Daubert* standard for a second.

22 The first question that I have to determine, I think,
23 is whether or not expert testimony is even necessary for a
24 Plaintiff to establish a prima facie case, because if it's not,
25 if one does not need expert testimony, then this whole

1 discussion is a little bit of a red herring.

2 Wisconsin Courts don't require expert testimony as
3 long as the case involves issues within the common knowledge of
4 a lay jury, that is Peplinski v Fobe's Roofing, Inc., 531 NW 2d
5 597 at 601, a 1995 case from Wisconsin. There are several
6 other cases, though, that make that same statement.

7 Products liability cases are not treated any
8 differently although this really technically isn't one, so you
9 don't necessarily have to have an expert witness if you've got
10 lay witnesses who can testify to the particular issue.

11 But here, as I indicated, the question is causation,
12 that's the whole bottom line discussion. And the question of
13 causation and I'm quoting here:

14 "Like the issue of negligence involves technical,
15 scientific or medical matters which are beyond the
16 common knowledge or experience of jurors and without
17 the aid of expert testimony the jury can only
18 speculate as to what inferences to draw if the jury
19 were left to its own devices to determine the issue."

20 That's the City of Cedarburg case, and the full cite
21 for that is at -- where did I put it? There, 149 NW 2d 661 at
22 662, a 1967 case from the Supreme Court of Wisconsin.

23 So it's pretty clear here as I just stated the issue
24 that I believe is going to be before a jury that the only way
25 for the Plaintiff to be able to prove the kind of causation

1 that we've just been talking about is through expert witnesses.

2 So that then takes us to the next question. Rule
3 702, of course, is the governing rule. The attorneys have
4 already said that, as well as Daubert versus Merrell Dow
5 Pharmaceuticals, 509 US 579 from 1923 -- 1993.

6 Rule 702 says that:

7 "A witness may testify as an expert and it is
8 discretionary with the Court if the witness is an
9 expert by knowledge, skill, experience, training or
10 education. The expert's knowledge will help the
11 trier of fact to understand the evidence or determine
12 a fact at issue. The expert's testimony is based on
13 sufficient facts or data and is the product of
14 reliable principles and methods, and the expert has
15 reliably applied those principles and methods to the
16 facts of the case."

17 The Supreme Court has held that:

18 "The Federal Rules of Evidence assigned to the trial
19 Judge the task of ensuring that an expert's testimony
20 both rests on a reliable foundation and is relevant
21 to the task at hand."

22 That's a quote from *Daubert* at Page 597.

23 The *Daubert* Court concluded that:

24 "Under Rule 702 a District Court must engage in a
25 three-step inquiry before allowing a witness to

1 testify as an expert:

2 First, the Court has to determine whether the expert
3 is proposing to testify to scientific knowledge that
4 will assist the trier of fact to understand or
5 determine a fact in issue.

6 Second, the Court must determine whether the
7 reasoning or methodology underlying that testimony is
8 scientifically valid.

9 And, third, the Court must determine whether that
10 reasoning or methodology properly can be applied to
11 the facts at issue at the case."

12 Daubert interpreted an earlier version of Rule 702,
13 but it remains as the Seventh Circuit has said:

14 "The gold standard for evaluating the reliability of
15 expert testimony and is basically codified in the
16 current Rule 702."

17 That's Manpower Inc. versus the Insurance Company of
18 Pennsylvania, 732 F3d 796 at 806 from the Seventh Circuit in
19 2013.

20 702 says that "An expert witness can be qualified as
21 an expert by knowledge or by skill or by training or by
22 education," any of those will work, and it also includes
23 experience so you don't even necessarily need to have those
24 things.

25 "An expert need not have a particular academic

1 credential to be qualified. Anyone with relevant
2 expertise enabling him to offer a responsible opinion
3 testimony helpful to the Judge or jury may qualify as
4 an expert witness."

5 That's Tough Racing Products, Inc. versus American
6 Suzuki Motor Corporation, 223 F3d 585 at 591, a 2000 case from
7 the Seventh Circuit.

8 "In order to be relevant for the purposes of Rule 702
9 the testimony must assist the trier of facts to
10 understand the evidence or to determine a fact in
11 issue."

12 "Relevant evidence is evidence that has a tendency to
13 make the existence of any fact that is of consequence
14 to the determination of the action more probable or
15 less probable than it would be without the evidence."

16 That's from *Daubert* at Page 587 and of course it's
17 quoting 401 -- Rule 401:

18 "Where an expert's hypothetical explanation of the
19 possible and probable causes and would aid the jury
20 in its deliberation that testimony satisfies
21 *Daubert's* relevancy requirement."

22 That's Smith versus Ford Motor Company, 215 F3d 713
23 at 718 and 19, again, a 2000 case from the Seventh Circuit.

24 "If an expert uses hypothetical explanations for
25 causes of an event those hypotheticals must have

1 analytically sound bases rendering them more than
2 mere speculation by the expert.

3 Again, *Daubert* at Page -- I'm sorry, *Smith Motor*
4 *Company* at Page 719.

5 "The question of whether the expert's theory is
6 correct given the circumstances of a particular case
7 is a fact question that's for the jury."

8 Again from *Smith*.

9 "The factors that the trial Court must consider when
10 determining reliability of an expert's testimony are:
11 Number 1, of whether the expert's theory or technique
12 can be and has been tested.

13 Number 2, whether the theory or technique has been
14 subjected to peer review and publication.

15 Number three, the known or potential rate of error.

16 And, Number four, general acceptance in the relevant
17 scientific community."

18 That's from *Daubert* at Pages 593 through '94.

19 So that is the standard that I have to employ in
20 looking at the proposed testimony of each of these experts.

21 The first one is Dr. Anderson and there's been a good
22 deal of discussion today about Dr. Anderson.

23 Papst argues that Dr. Anderson's opinion isn't based
24 on sufficient facts or data because, as -- as Mr. Schumacher
25 also argued with regard to Mr. Garza, Dr. Anderson never

1 mentions Papst in his opinion. He admits that he doesn't have
2 any specific knowledge relating to Papst or exposure on the
3 Papst premises except I think that he might have gone there one
4 time and had a brewery tour, but other than that no -- no
5 exposure to the premises. Did not estimate Mr. Ahnert's
6 specific exposure to asbestos-containing products at the Papst
7 facility.

8 And Mr. McCoy just indicated today in the hearing
9 that he has never said that Dr. Anderson is going to say
10 specifically that Papst had this particular exposure that
11 caused this or caused that.

12 Dr. Anderson's testimony -- sorry, Dr. Anderson's
13 report, I've got too much paper, too, at Page 8 of his report,
14 and I have that as Docket Number 67 in the -- in the 2010 case,
15 at the bottom of that page Dr. Anderson indicates what his
16 opinions are within the bounds of medical certainty that he's
17 going to give. And those are:

18 "Number 1, and Mr. Daniel Ahnert developed a
19 malignant pleural mesothelioma on the left (spindle
20 and epithelial type) which was the primary cause of
21 his death.

22 Number two, Mr. Ahnert suffered from asbestosis and
23 bilateral calcified and noncalcified pleural plaques.
24 Asbestosis was a substantial contributing cause of
25 his death.

1 And, Number three, the malignant left pleural
2 mesothelioma, asbestosis and bilateral calcified and
3 noncalcified pleural plaques were caused by his
4 combined occupational and bystander exposure to
5 asbestosis."

6 That is a specific causation opinion. That is not
7 this is what happens when people are exposed to asbestos;
8 that's not this is what can cause mesothelioma, that is a
9 specific opinion.

10 It isn't specific in the sense that it doesn't refer
11 to Papst, it doesn't say that it was exposure to Papst, or
12 exposure, quite frankly, on this particular page of the report
13 Sprinkmann or WEPCO either, but it is a specific conclusion as
14 to what caused the diseases from which Mr. Ahnert died.

15 Dr. Anderson then goes through in more detail and
16 says and I quote -- I'm actually quoting from my own notes, so
17 don't say I quote, I don't consider it a quote, but that all
18 exposures to asbestos fibers are considered to contribute to
19 the disease process.

20 He was actually asked whether he'd give an opinion as
21 to the actual dose that Mr. Ahnert may have received during his
22 working activities, and he replied "The only thing I would say
23 is the dose was sufficient to cause asbestosis, pleural plaques
24 and mesothelioma. So -- and that's based on medical
25 literature, my training, professional judgment."

1 Dr. Anderson admitted in the deposition, and as an
2 aside let me say nor am I familiar with the concept of a
3 "*Daubert* deposition." I guess I always consider an expert
4 witness's deposition to be in some way related to *Daubert*
5 because the whole point of deposing an expert witness is to
6 find out whether they have the kinds of opinions that would be
7 admissible under *Daubert* and what those opinions are, so
8 forgive me, but I'm not familiar with that either. But in
9 whatever kind of deposition this was Dr. Anderson admitted that
10 he didn't have any knowledge specific to the facilities in this
11 case, whether these facilities used asbestos fibers, any
12 specifics of that nature at all.

13 There is this affidavit to which Mr. McCoy has
14 referred, and the -- it was presented in connection with the
15 Motion to Exclude Mr. Anderson -- or Dr. Anderson. It's dated
16 October 15th of 2017.

17 Now there is an argument made and I think some hint
18 that what that affidavit really is is a supplemental expert
19 report and as such given the fact that it was filed seven years
20 after this lawsuit started and without leave of Court and
21 without seeking leave of Court, that it could be considered a
22 supplemental and untimely supplemental expert report under
23 26(a)(2)(B).

24 Mr. McCoy has argued today that all it is is evidence
25 of foundation or supporting evidence of foundation. Quite

1 frankly I'm not entire sure that I agree with that, but whether
2 that is true or not I don't think makes a difference to the
3 decision. The October 15th, 2017 Declaration says that the
4 asbestos fibers become invisible as they break down and they
5 can float for hours and I don't have any reason to dispute
6 that.

7 Then it talks about inhalation and how they're
8 retained by the body and they don't decompose.

9 He says that he's familiar with Mr. Ahnert's work as
10 a pipefitter although as I read it basically what he's saying
11 is I understand that Mr. Ahnert worked as a pipefitter.

12 And then he talks about his knowledge of work
13 practices that can lead to asbestos -- to asbestosis.

14 This is the first time that he ever mentions
15 something about a "dose-response relationship, i.e., inhaling
16 more fibers increases the risk of developing mesothelioma."
17 That I don't think was mentioned in the prior report.

18 And he makes some more specific references to
19 Mr. Ahnert that he did not make in the prior report. So to the
20 extent that one might consider this a supplemental report I
21 think that new information might support that theory, but still
22 even in this affidavit Dr. Anderson doesn't address the fact
23 that he doesn't have any knowledge specific to any of the
24 particular Defendants; he doesn't have any knowledge specific
25 to Mr. Ahnert's exposure on any particular job site and

1 particularly Papst because there's no mention of Papst at all.

2 He testified at one of his prior -- at his prior
3 deposition that he didn't need to do fiber burden calculations
4 in order to make his opinion with regard to cumulative exposure
5 which, by the way, he can't testify to under *Krik*, but in the
6 same deposition then he said that there has to be more than one
7 single brief exposure to the asbestos. So I guess you probably
8 figure out where I'm going with this, which is that there is
9 nothing in Dr. Anderson's original report, there is nothing in
10 the October 15th report, which whether you consider it to be
11 buf -- supporting foundation, I don't really -- or consider it
12 to be a supplemental expert report, there is nothing in any of
13 those reports anywhere that provides any information with
14 regard to specific causation or that supports any information
15 with regard to specific causation.

16 Now, I think, and I don't necessarily hear the
17 Defendants disagreeing, that he certainly seems to have some
18 knowledge about mesothelioma, causes of mesothelioma, and
19 things of that nature. But as Mr. Schumacher argued in the
20 Pabst section of his argument, that is general causation
21 testimony. That is educating a jury about what mesothelioma
22 is, what asbestosis is, and what can cause those diseases. It
23 is in no way specific to Mr. Ahnert.

24 I understand the Plaintiffs expression of concern
25 that under cases like *Krik* and places in other Federal Courts

1 that have come to the same conclusion that the Seventh Circuit
2 has come to, that this creates a very difficult world for a
3 plaintiff in a case like this. Most of his exposures happened
4 years and years and years ago, as we're all aware. It is very
5 hard if you don't have people who can stand there and say,
6 yeah, I stood next to him every single solitary day and he
7 worked for this many minutes with this much stuff floating
8 around. It is very hard to figure out how many of those little
9 fibers settled down in the bottom of one's lungs. I understand
10 that.

11 I'm not sure, though, that under Seventh Circuit law
12 I can provide any solution to that issue. The Seventh Circuit
13 has made clear that as to specific causation cumulative won't
14 do it, any and every won't do it, whatever, whatever you call
15 it won't do it. There has to be a specific -- the expert has
16 to be able to use facts that specifically draw a line of
17 causation between a particular defendant and a particular
18 plaintiff and the disease that the particular plaintiff
19 suffers.

20 I also understand that Dr. Anderson, forgive my
21 saying, made a statement that he doesn't subscribe to the any
22 exposure or the each and every exposure theories. I know
23 that's what he said, but every other word of his reports
24 indicates that that's exactly what he does. And perhaps that
25 is the only way in a case like this that one can get close to

1 describing causation, but under the existing law it's not
2 enough.

3 Now, to Mr. Schumacher's point that deciding a
4 *Daubert* motion is not the same as deciding a dispositive
5 motion. Certainly I agree and I'm surprised that there's a
6 case out there that actually says it, because it seems like a
7 given. It can prove dispositive in some cases. I have had
8 cases in which once the expert has been excluded a party says,
9 well, that's it for me. But that's different than a
10 dispositive motion in which a Court says I'm deciding this
11 motion and the case goes away.

12 So I don't believe it is appropriate to exclude
13 Dr. Anderson's testimony entirely and I'm not sure that that's
14 necessarily what either -- any of the Defendants have been
15 asking for. What I believe is prohibited and what there is no
16 evidence here to support is for Mr. Anderson to give -- or
17 Dr. Anderson, sorry, to give testimony as to specific
18 causation. And as I indicated, at Page 8 of the report at
19 Docket Number 67 that's exactly what he proposes to do.

20 You know, I suppose we can talk about, you know,
21 because he appears to qualify as an expert on mesothelioma and
22 on asbestosis we can rely on hearsay and so if he wants to look
23 at the medical -- at the coroner's report and say this seems to
24 be what Mr. Ahnert died of, I suppose he can do that. And he
25 can look at it and say -- he could look at the doctors' perhaps

1 and say this is what he suffered from. But the third point
2 that he proposes to testify to, the causation point, is exactly
3 the kind of testimony that is barred under Krik based on what
4 we have here.

5 And I appreciate Mr. McCoy's argument that this is a
6 more developed record than the record was in Krik. I reckon
7 maybe it is. But the bottom line is regardless of how
8 developed this record is, it is void in Dr. Anderson's case of
9 anything that would support a specific causation opinion.

10 And so I am going to grant Pabst's motion and as well
11 as Sprinkmann, Employers, and WEPCO's motion to the extent that
12 they are seeking an order prohibiting Dr. Anderson from
13 testifying as to specific causation for Mr. Ahnert's
14 mesothelioma and Mr. Ahnert's asbestosis. If the Plaintiff
15 wants to call Dr. Anderson to testify generally about what
16 those two diseases are and the sorts of things that cause them,
17 that's certainly the Plaintiff's prerogative and from what I
18 can tell Dr. Anderson seems to have the qualifications under
19 *Daubert* to be able to testify to that. But there is nothing in
20 any record that would put him in a position to be able to
21 qualify as to specific causation with regard to Mr. Ahnert.

22 In addition, on top of that in Sprinkmann, Employers,
23 and WEPCO's motion they also asked that I preclude Dr. Anderson
24 from testifying about the costs of Mr. Ahnert's treatment, how
25 reasonable those costs were and the necessity of those costs.

1 They argue that Dr. Anderson never met or spoke with
2 Mr. Ahnert, never examined him, never had any interaction with
3 him in any way about that. And so while certainly
4 reasonableness is an issue, the fees as an issue or the costs
5 as an issue, that's not something Dr. Anderson should testify
6 to. I think the Plaintiff has conceded that it's not -- that
7 was not -- she was not planning to ask Dr. Anderson that
8 information.

9 **MR. MC COY:** That's correct, Your Honor.

10 **THE COURT:** All right.

11 **MR. MC COY:** And it wasn't even an issue for us.

12 **THE COURT:** Okay. All right. Well, I just -- I
13 wanted to go ahead and hit it anyway.

14 And so, again, the Plaintiff indicated that in that
15 particular response that Mr. McCoy wanted to ask Dr. Anderson
16 about the nature of mesothelioma, the symptoms, the causes, the
17 treatments given to the persons who contract it, and how he
18 sees death in those afflicted with it. Again, that seems to me
19 to be a general testimony; to a general extent that will be
20 allowed. But nothing with regard to cost of medical bills and
21 nothing with regard to specific causation.

22 Okay, then we move on to Dr. Brody, the biologist --

23 **MR. MC COY:** May I just ask one question, Your Honor?

24 **THE COURT:** Certainly.

25 **MR. MC COY:** So he can't testify that what went on at

1 Pabst was a cause, meaning -- does that mean that he cannot
2 answer like a hypothetical? The hypothetical question was
3 simply about the removal of gaskets or pipe thermal insulation.

4 **THE COURT:** No, I certainly think that you can ask
5 him, you know, if the removal of a gasket or the removal of a
6 pipe or thermal -- (indisc.) released the asbestos fibers and
7 somebody was exposed to that for a certain, you know, a long
8 time, or whatever, I don't know how you'd phrase your question,
9 would you think that that might be something that could cause
10 or contribute to these diseases. Yes, you can ask a question
11 like that. But, again, with regard to Mr. Ahnert and with
12 regard to Pabst, or frankly with regard to Sprinkmann and with
13 regard to WEPCO, no specifics because it's not there.

14 **MR. MC COY:** Okay. I understand what your line is.

15 **THE COURT:** All right. With regard to Dr. Brody, I
16 think maybe that discussion just answers Dr. Brody in terms of
17 what I had indicated, that they were not going to be -- she was
18 not going to be asking Dr. Brody any kind of medical causation
19 opinion. I don't know --

20 **MR. MC COY:** That's correct.

21 **THE COURT:** -- I assume that Dr. Brody again is
22 background about the impact of asbestos on the human body.

23 **MR. MC COY:** Right.

24 **THE COURT:** And that takes us to Dr. Staggs and I
25 think that Dr. Staggs' opinion actually has even more concerns

1 for me than Dr. Anderson's. And in this respect Pabst argued
2 that there are not sufficient facts and data again that
3 Dr. Staggs was relying on and he doesn't really mention Pabst,
4 other than to note that somebody had told him that at one point
5 at sometime Mr. Ahnert worked at Pabst. That was it in terms
6 of any specific knowledge that he might have had.

7 There's even less information in Dr. Staggs' report
8 about Mr. Ahnert's work history or about his medical records,
9 about -- and there is only one paragraph in the opinion that
10 talks about those particular issues. He specifically said,
11 Dr. Staggs did, in his deposition that he didn't have any
12 information sufficient to attribute any asbestos exposure to a
13 specific Defendant, to a specific product, to a specific
14 location. He testified that he didn't have any knowledge
15 regarding dose that might have been encountered. And very much
16 like Dr. Anderson, Dr. Staggs' testimony in his deposition was
17 that no asbestos fibers can ever be excluded as an agent in
18 causing mesothelioma or any of the data relevant to this
19 individual and specific matter and that everyone in the United
20 States is exposed to background levels of asbestos.

21 This is again the general testimony that we were
22 talking about earlier and it is also the cumulative testimony.
23 You know, you can't say that just because somebody sucked in
24 one fiber that wouldn't cause their disease. That is exactly
25 the any exposure or the each and every exposure or the cumulate

1 exposure issue that the Seventh Circuit has said, nope, can't
2 go there.

3 The Plaintiff responded to this motion by arguing
4 again that Dr. Staggs had said I don't subscribe to the each
5 and every or the any. I realize he says that, but then he
6 follows up by saying that the exposures do have to
7 mathematically contribute to the cumulative dose and overall
8 that increases your risk. It's the same thing. It's exactly
9 what the Seventh Circuit said in Krik.

10 He then followed that up by saying I only assess it
11 on a case-by-case basis by trying to make a, quote,
12 quantitative comparison with any given case about whether a
13 given exposure, because we're talking about specific instead of
14 general causation, specific causation or specific exposure,
15 however it's classified, contributes to the causation. It's
16 clear to me that Dr. Staggs knows and understands that there is
17 an issue with any exposure or each and every exposure.

18 But they then follow, I wrote down in my notes
19 somewhere, four pages, I think, or maybe it's eight pages, of
20 deposition testimony in which someone, I can't remember who,
21 asks Dr. Skaggs and said, okay, so tell us what this
22 quantitative analysis is and walk us through what exactly it is
23 that you do. And he did, but it was basically I rely on the
24 literature, I kind of take a look at what's given me, and I
25 make a determination based on what I know from my reading the

1 literature.

2 So because, again, there's no -- there's nothing from
3 Dr. Staggs that produces or supports any specific causation
4 analysis, I grant the motion with regard to Dr. Skaggs, again
5 to the same extent that I did to Dr. Anderson, which is that he
6 can testify about what he understands causes -- caused these
7 diseases and what he understands the relationship to -- between
8 asbestos and these diseases may be, but not any specific
9 testimony with regard either to Mr. Anderson -- I mean to
10 Mr. Ahnert or to these particular Defendants.

11 With regard to Mr. Garza, I'm looking at Pabst's
12 motion to exclude at Docket 18 -- 118, excuse me, and
13 Sprinkmann, Employers, and WEPCO's motion to exclude, that was
14 combined in Docket Number 121. And everyone asks me to bar
15 Mr. Garza's testimony and they make that request on several
16 bases.

17 The first, I think, is there's an argument that he's
18 not actually qualified to testify as an expert. He's not
19 licensed in Wisconsin, he's licensed in Texas. He doesn't have
20 a Ph.D., he has a Master's in environmental science and
21 management. He is licensed in Texas, I guess, for asbestos
22 consulting, but not in Wisconsin. Somebody recalls, I can't --
23 somebody says, I can't recall who, that he failed his first
24 certified industrial hygienist exam. Okay, I think the Seventh
25 Circuit, unfortunately, or fortunately, depending on how you

1 look at it, is indicating that -- has indicated that there are
2 no particular credentials that are required for someone to
3 qualify as an expert and, in point of fact, experience can
4 qualify someone as an expert. The Rule says that. The Seventh
5 Circuit has says that. The old joke about the one guy who
6 lives in Dallas County who valued every single farm that ever
7 got sowed there, he'd never been trained for anything but he
8 valued every single solitary farm there and he got qualified as
9 an expert because he had the experience.

10 I think Mr. Garza appears to certainly have
11 experience in asbestos -- in assessing asbestos in industrial
12 settings. He's done a lot of inspections. His information
13 talks about that. So in terms of whether or not he's qualified
14 to testify on that topic generally, I think he is qualified.
15 Maybe not to the extent that some other people would be, but I
16 think he's qualified.

17 The next issue that the parties raise is that he
18 doesn't base his decision, his testimony on any specific
19 sufficient facts or data. And here I think we have a bigger
20 concern. Again, Mr. Garza's opinions are generic, they don't
21 relate to any of the Defendants specifically in this case, they
22 don't really relate to Mr. Ahnert. Someone apparently gave him
23 a list of "X" number of job sites where Mr. Ahnert had worked,
24 but there were no dates there, there was no indication of when
25 Mr. Ahnert worked at any of those places, how long he worked at

1 any of those places, what he was doing at those places when he
2 was working there. And so basically what seems to have
3 happened, as one counsel argued today, it may have been
4 Mr. Rhoades or both, argued that he basically just looked at
5 the literature and regurgitated or recited some of what the
6 literature says about these issues. There was an allegation
7 made by the Defendants that he didn't do any air sampling, he
8 didn't do any testing, and the Plaintiff responded and said,
9 well, he doesn't have to, as long as he reads the literature,
10 that's fine and that's what he's done here. And then
11 Mr. Rhoades raised in some detail concerns about the literature
12 and whether or not it actually is peer reviewed literature and
13 whether it is reliable literature.

14 But I think to me the bigger concern is that
15 Mr. Garza's testimony is far more attenuated than even that of
16 the doctors. There is just simply no link, meaning that
17 there's no discussion either of any of the premises, there's no
18 discussion of any of the specific products, there's no
19 discussion of anything really that particularly directly
20 relates to this case. It is, as the Defendants have argued, a
21 very general report. And let me be clear, by it being a
22 general report, I mean the August 10th, 2012 report. That is
23 the original report that was turned over and there's simply
24 nothing in there that I can identify that in any way, shape, or
25 form has any specific connection to this case.

1 At least in the doctors' opinions the doctors knew
2 what Mr. Ahnert suffered from and factored that in to some of
3 their discussions. I think Mr. Garza's is even more attenuated
4 than that. There's just no underlying data here.

5 Now, I understand the Plaintiff's argument again
6 that, you know, what are you going to do, you're going to go
7 out there, you're going to take a hammer, you're going to whack
8 down on a pipe and see if stuff floats up; well, you can't even
9 do that now because time has passed and stuffs been removed and
10 that's the whole point here. I get it. But *Daubert* talks
11 about a reliable methodology upon which someone can rely and
12 that can be repeated and that can be described. That implies
13 that there has to be some sort of methodology. And as far as I
14 can tell from reviewing Dr. Garza's 2012 report, the
15 methodology is read the literature. I don't think that's a
16 methodology. Certainly experts should do that, experts do do
17 that, they're entitled to rely on it in their testimony and in
18 forming their opinions. But if that is all there is, and that
19 appears to be all there was for Garza, that's not a
20 methodology. That's reading the literature.

21 And so I couldn't really identify any specific
22 methodology that somebody could walk through and say so you've
23 done this 15 times and each time you've come to this conclusion
24 or that conclusion. I don't see it here from Mr. Garza.

25 In addition, there are two additional reports. One

1 was disclosed on August 7th of last year, although it was
2 written October 19th of 2015, 55 pages long. And then there
3 was an August 10th, 2017 report that was 45 pages long. As the
4 parties are aware, the experts reports in the MDL case, in the
5 2010 case, were due on August 13th of 2012. That's the
6 deadline that Judge Strawbridge had set. And then
7 Judge Clevert had set a deadline in 2014, I think it was
8 September 15th, 2014. And the Defendants argue that both of
9 these reports should be barred as untimely. The 2015 report
10 should be barred because Judge Strawbridge found it untimely in
11 the 2010 case. And I don't know if there was much comment on
12 the August 10, 2017 report. There's no question that the
13 August 10th, 2017 report is untimely. And so even I were
14 allowing any testimony from Mr. Garza, I certainly wouldn't
15 allow that report.

16 I suppose we could quibble over whether or not, even
17 though it was late by the MDL standards, it was timely by
18 Judge Clevert's standards and might impact the October 19th,
19 2015 report. However, again, I think that's a rehashing pretty
20 much of the general report that was provided back in 2012.

21 But, quite frankly, I think it's irrelevant. I don't
22 think that there's any information in any of these reports that
23 I have been able to find that indicate in any way that
24 Mr. Garza's testimony would even be helpful to the trier of
25 fact necessarily, given the lack of methodology that I could

1 identify.

2 I do note, just as an aside because Mr. McCoy may
3 raise it, that Ms. Ahnert did say that she would agree not to
4 use anything in the 2015 report in the event that that would
5 make things run a little more smoothly. But I think it's a
6 moot point given the determination on Mr. Garza's testimony.

7 **MR. MC COY:** May I comment on that for a moment,
8 Judge?

9 **THE COURT:** Sure.

10 **MR. MC COY:** Mr. Garza does cite in his report the
11 testimony about the WEPCO's Oak Creek Powerhouse.

12 **THE COURT:** He does mention that. That is correct.

13 **MR. MC COY:** And he -- so he had knowledge of the
14 specific activities at the Oak Creek Powerhouse. I mean that
15 to me is the thrust of the concern, which is because then he
16 has the opinion that each of the exposures are significant and
17 he describes the exposures at Oak Creek. So it's within those
18 exposures that it's one of the significant exposures. That's
19 laid out in his report, is that he read the testimony.

20 **THE COURT:** And you're correct. I apologize.

21 **MR. MC COY:** It's -- and I think his testimony is
22 backed up by the knowledge of what went on at these work sites
23 from the coworkers, in addition to what's in the general
24 literature. So when you put the two together, I think that's
25 sufficient basis to testify in this case about these

1 activities.

2 Now again, he's not giving an opinion that everything
3 and anything that went on at WEPCO is wrong and this is
4 significant exposure, but he is describing and relating these
5 particular activities that he's got information on from the
6 coworkers and he's saying those are significant exposures. I
7 think that that -- I believe that testimony is properly
8 disclosed and laid out and tied into his review of the general
9 literature.

10 I mean there is no -- as you say, there is no
11 measurements back in that period of time. These cases don't
12 necessarily even exist. So he's dealing with the best
13 available evidence that we have and relating that through the
14 general literature to what's a significant exposure. And
15 that's his opinion in his 2012 report, that this would be one
16 of the significant exposures.

17 I just think he's properly disclosed on the basis of
18 this and he's got sufficient information, I believe he's
19 qualified under the *Daubert* standards.

20 **THE COURT:** Thank you for correcting that error.
21 And, Mr. McCoy, you are right, he does talk about the Oak Creek
22 plant in there.

23 **MR. MC COY:** He doesn't talk about Pabst. I agree
24 with that.

25 **THE COURT:** Right. Right. But he does talk about

1 the Oak Creek plant. And so I was a little bit overly broad
2 with my brush in saying that he doesn't mention any of these
3 Defendants.

4 That still doesn't address the concern, however,
5 about a lack of reliable methodology. And again, I go back to
6 the fact that I realize that because many years have passed he
7 no longer has the ability to say here's what I do, I go in
8 there and I take an air sample and then after I test it I look
9 for certain rates above this amount or below that amount or
10 whatever it may be. I completely understand that he can't do
11 that. I'm not sure how to address that general fact within the
12 confines of *Daubert* and within the confines of what the Seventh
13 Circuit has said we need to rely on in terms of someone
14 testifying as an expert.

15 So while you are correct that I spoke overly broadly
16 in indicating that he made no mention of any of the Defendants,
17 he did talk about the WEPCO plant and the information that he
18 saw in the testimony of the employees, that still doesn't
19 address the reliable methodology issue. And even with the
20 passage of time *Daubert* still requires that in order for
21 someone to testify as an expert that person must have some sort
22 of reliable methodology. And as I indicated, that's missing
23 here.

24 **MR. MC COY:** Well, I would again --

25 **THE COURT:** Mr. McCoy, if you want to file a motion

1 to reconsider, I'd be happy to entertain it.

2 **MR. MC COY:** I will, Judge.

3 **THE COURT:** Okay.

4 **MR. MC COY:** Thank you.

5 **THE COURT:** Sure.

6 With regard to Docket Number 122, Sprinkmann and
7 WEPCO also filed a motion asking to preclude any lay witnesses
8 from offering opinion as to asbestosis and the cause of
9 asbestosis and so forth. This strikes me as a motion in
10 limine. I think it's a premature motion for me to rule on at
11 this point in time. I don't know of any lay witnesses that are
12 going to try to testify as to this. If they do, I would
13 certainly expect an objection, because a lay witness certainly,
14 as I found earlier, is not in a position to give expert witness
15 testimony or opinion on medical causation. And so I'm going to
16 leave that for a motion in limine or if someone wants to file
17 one, although I don't even think that I could decide it then.
18 I think it really is a wait if it comes up at trial, then I'll
19 deal with it when it comes up at trial.

20 The last issue that came up in the *Daubert* motions is
21 at Docket Number 120 and again included in Docket Number 122.
22 Pabst is at 120 and the other Defendants are at Docket Number
23 122. And that's with regard to Dr. Ellis, who was Mr. Ahnert's
24 personal doctor. The Defendants ask that I prohibit Dr. Ellis
25 from testifying about causation of the mesothelioma and the

1 asbestosis and specifics around the treatment of those two
2 diseases and they argue that Dr. Ellis is basically a general
3 practitioner doctor, that he was not a pulmonologist or an
4 oncologist, toxicologist, any of those sorts of roles, and that
5 he didn't have the expertise to testify as a witness, an expert
6 witness on those topics. I agree with that. I'm not sure that
7 the Plaintiff necessarily disagreed. The Plaintiff indicated
8 that Dr. Ellis admitted that Dr. Ellis wasn't an eyewitness to
9 anything that happened to Mr. Ahnert at any of the work sites
10 or with any of the Defendants and agreed that he wouldn't
11 testify as to anything Mr. Ahnert told him, which he couldn't
12 do anyway, or it would be hard to do.

13 I do think, of course, that because Dr. Ellis was
14 Mr. Ahnert's personal physician if there's any relevance to
15 what the condition of Mr. Ahnert's health was at any particular
16 time, he could make general observations as to that. He knows
17 that. The question of law on that, of course, is going to be
18 whether or not it's relevant. And that's a 403 issue that I'll
19 determine when and if he's called as a witness and we know what
20 he's going to testify to. So he could certainly testify as a
21 fact witness, a kind of hybrid witness as to what he saw in
22 Mr. Ahnert's health condition and what kind of condition
23 Mr. Ahnert was in, but not to the causes of asbestosis or
24 mesothelioma or what may have caused Mr. Ahnert's particular
25 asbestosis and mesothelioma, because there's nothing to

1 indicate that he has any expertise in that area.

2 **MR. MC COY:** You're talking about general causation
3 of mesothelioma, that he can't testify to that? Is that --

4 **THE COURT:** No, I don't have any information that he
5 has any expertise in that.

6 **MR. MC COY:** Well, I mean again I understand the
7 ruling, I just want to make sure if that's the ruling that the
8 Defense can't go out there and argue, well, no treating
9 physician says it's related to asbestos, because if he doesn't
10 have the ability to they can't make that argument either.

11 **THE COURT:** I think -- well, I'm not sure that the
12 two are related. I mean he doesn't have the expertise. I mean
13 there may be somebody out there who can say. The coroner
14 apparently has made a determination he died because of
15 mesothelioma or asbestosis. But that wasn't Dr. Ellis that
16 made that determination. And again, I don't see that
17 Dr. Ellis -- I have nothing in front of me with regard to
18 Dr. Ellis being able to say what caused the mesothelioma or
19 what caused the asbestosis. And in point of fact, you've named
20 two experts who you think have much more expertise in what
21 causes those two diseases than, as far as I could tell,
22 Dr. Ellis.

23 **MR. MC COY:** Right. And again, I'm -- I don't agree
24 with Your Honor's ruling, but I'm accepting it --

25 **THE COURT:** I know.

1 **MR. MC COY:** -- when I make this -- when I express
2 the concern that I am, which is that the Defense not be allowed
3 to say, well, no treating physician has said it's related to
4 asbestos. Because I hear that argument often at these trials.

5 **THE COURT:** I'm sure you do, but that's also a true
6 fact.

7 **MR. MC COY:** Well, you said he's not -- but he did
8 express that opinion and if they say that then I think we can
9 open the door to allow the opinion.

10 **THE COURT:** Well, if you brought evidence to me that
11 he's got some basis for expressing that opinion, some knowledge
12 expressing that opinion that would allow him to testify to it
13 as an expert, then we should talk about that. Because I'm not
14 aware of it.

15 **MR. MC COY:** Well, like I say, I'm accepting in my --
16 the concern I'm expressing your ruling, but I'm just saying
17 that the trade-off has to be to prevent the Defense from
18 arguing that, well, no treating physician said it's related to
19 asbestos.

20 **THE COURT:** No, the trade-off doesn't have to be that
21 and I'm not going to make that ruling right now. Because,
22 first of all, I don't even know if they're going to make that
23 argument; and second of all, if they do, I think there's a
24 difference between saying that nobody's gotten up here, no
25 treating physician has gotten up here and said that and the

1 question of whether or not Dr. Ellis is qualified to say that.
2 And the motion here was that he's not qualified to say that, as
3 I understand it.

4 **MR. MC COY:** Okay. I won't say anymore today.

5 **THE COURT:** Now, what I have thought possibly of
6 doing is also giving you some rulings on the motions in limine.
7 But, number one, I expect there are folks who might need to use
8 the facilities; and, number two, you might not have anticipated
9 being here all afternoon. I have no idea. So I will leave it
10 to you all. We can take a bathroom break and I can come back
11 and give you some rulings on motions in limine or we can all
12 gather our wits about us and then come back and talk about
13 motions in limine on a different date.

14 **MR. SPEAKER:** I'll jump in here, Your Honor.

15 **THE COURT:** Okay.

16 **MR. SPEAKER:** I'm perfectly fine to sit here as long
17 as Your Honor would like and hear Your Honor's thoughts. My
18 office is in St. Louis --

19 **THE COURT:** Boy, you are a bored person, aren't you.

20 **MR. SPEAKER:** No, my office is in --

21 **THE COURT:** Yeah.

22 **MR. SPEAKER:** -- is in St. Louis, so I'm here.

23 **THE COURT:** Right. Right. Okay. So you're free to
24 go back to your hotel and watch the football game, but anyway.
25 So I'll leave it up to the other two of you.

1 **MR. SPEAKER:** If there's going to be separate hearing
2 on some of the motions in limine, I'd kind of prefer that they
3 all be done at the same time, because I think they often
4 overlap in part.

5 **THE COURT:** No, I'm sorry, I perhaps didn't clearly
6 state what I was proposing. I was proposing either that I give
7 you the rulings on the motions in limine in toto this afternoon
8 or that we set a different date for giving those rulings. I
9 wasn't proposing to break it up. They all do overlap, in fact,
10 many of them are repetitive.

11 Have a druther?

12 **MR. SPEAKER:** That's fine. I'm ready to press on if
13 you are.

14 **THE COURT:** Okay, well, let's --

15 **MR. SPEAKER:** If that's the case, then yes.

16 **THE COURT:** Okay. Then let's take a few minutes at
17 least and let me give Ms. Wrobel a break and I need to go potty
18 if nobody else does. I'll excise that from the record later.
19 So just when everybody gets back, we'll --

20 **THE MARSHAL:** All rise.

21 **(A recess was taken from 4:02 p.m. to 4:16 p.m.; parties**
22 **present)**

23 **THE COURT:** I'm sorry. I thought I had left my
24 glasses back there but I left them in here.

25 **MR. SCHUMACHER:** Your Honor?

1 **THE COURT:** Yes.

2 **MR. SCHUMACHER:** Before you move on to the motions in
3 limine, do you mind if I ask just a few clarification questions
4 before we walk out just to make sure that we understand your
5 rulings?

6 **THE COURT:** Sure. That's assuming that I do.

7 **MR. SCHUMACHER:** Okay. We'll muddle through
8 together.

9 **THE COURT:** Okay.

10 **MR. SCHUMACHER:** So it's my understanding that
11 Mr. Garza is struck in his entirety?

12 **THE COURT:** Yes.

13 **MR. SCHUMACHER:** Okay. And Drs. Anderson and Staggs
14 are able to give only general causation opinions?

15 **THE COURT:** Yes.

16 **MR. SCHUMACHER:** Okay. And what I was confused or
17 concerned about was when -- and I'm not even sure if it was the
18 Court or if it was Mr. McCoy started giving a hypothetical
19 example that seemed to veer back into specific causation as
20 being potentially acceptable.

21 **THE COURT:** So as I recall it -- and I'm glad you
22 asked about it because we should probably be clear about it --
23 Mr. McCoy asked whether or not -- and he was referring to a
24 hypothetical that he had proposed in one of the moving papers,
25 I think, and I didn't have it open in front of me and maybe I

1 should have had it open in front of me. And I said something
2 along the lines of -- I can't quote my own self but, you know,
3 if you want to ask whether or not if somebody is removing the
4 gasket and it throws up asbestos fibers and, you know, they're
5 working on that for a long time and, you know, that could
6 somehow or another contribute to or cause somebody to perhaps
7 contract these diseases, you can certainly ask that.

8 **MR. SCHUMACHER:** But if I may, doesn't that
9 hypothetical start to veer into some of the same problems that
10 we've discussed with regard to methodology, dose, exposure,
11 time period, error rate?

12 **THE COURT:** And, you know, I -- to me, that's the
13 sort of issue that -- there's obviously a spectrum, right? And
14 so there are medical doctors who are capable of saying,
15 inhaling asbestos fibers -- if you inhale enough of them -- can
16 cause mesothelioma and so if somebody was in a situation where
17 they inhaled a lot of the fibers, they could contract
18 mesothelioma and mesothelioma is the kind of disease that can
19 kill somebody. I'm being very broad.

20 On the other end of the spectrum is someone who can
21 say, Daniel Ahnert contracted mesothelioma from the time that
22 he spent extracting gaskets at wherever and fitting pipes at
23 wherever and that's what caused him to contract it and then
24 that's what caused him to die. That's about as specific as I
25 can imagine that you can get. Or maybe more specific would be,

1 you know, on January 17th, 1972 while he was there for two
2 hours, he absorbed enough that I believe he would -- that's
3 specific.

4 There is a continuum between those two extremes and
5 so as I understood the question that Mr. McCoy was asking -- if
6 he's asking a question that relates to -- you know, let's say
7 that somebody is working on a job that throws up -- or is
8 capable of throwing up mesothelioma -- asbestos fibers and they
9 breathe that in, could that cause them theoretically to
10 contract mesothelioma or could it contribute to mesothelioma?

11 Does that fall on the one side of the line of the
12 spectrum or on the other side of the line of the spectrum?
13 It's getting closer, yeah. Is it specific testimony as to
14 Mr. Ahnert? Not yet, I don't think. Where the hypothetical
15 gets to that it gets to a point where it crosses the line
16 depends on the specific orient of the hypothetical, I think.
17 And so if we need to go back and look at the actual
18 hypotheticals that he proposed in his moving papers, we can do
19 that. I mean, I think the Seventh Circuit is clear that
20 experts can rely on hypotheticals but --

21 **MR. SCHUMACHER:** And I certainly don't disagree with
22 Your Honor. I guess obviously my concern on behalf of Pabst is
23 a concern about sort of back-dooring --

24 **THE COURT:** Right.

25 **MR. SCHUMACHER:** -- the specific causation testimony

1 that Your Honor has just excluded, you know, through some very
2 artfully worded hypotheticals.

3 **THE COURT:** And that's why I say, I don't -- where
4 you fall on that spectrum is going to depend on how the
5 hypothetical is worded and I can see that you can cross the
6 line. I don't know that I ever let Mr. McCoy get specifically
7 out word for word what he was going to say and then I
8 summarized something in a different way. So I don't have a
9 specific question in front of me.

10 I don't know -- you know, other than requiring
11 Mr. McCoy right here today to tell us exactly what questions
12 he's going to ask, I don't know if I can necessarily draw that
13 line today other than to say that if hypotheticals are
14 presented that do start getting closer to the testimony that I
15 prohibited, I'll sustain objections to those. I won't allow
16 those to be asked or, you know, we can handle it some other way
17 but there are hypotheticals I could imagine that he would ask
18 that would not run afoul of the ruling that I issued today.

19 There are others that he could ask that I could
20 imagine would clearly run afoul of the ruling that I've issued
21 today. That's not helpful, I know. I'm always glad to be
22 unhelpful.

23 **MR. SCHUMACHER:** It sounds that we're going to have
24 to potentially deal with this a little closer to --

25 **THE COURT:** To trial.

1 **MR. SCHUMACHER:** -- trial and it may require some
2 in-camera testimony or something like that because obviously,
3 again, my concern is once a hypothetical is out of the box, you
4 know, the limiting -- obviously, the concern a lot of us have
5 is the limiting instruction to the jury can only go so far once
6 the -- you know, the genie is out of the bottle.

7 **THE COURT:** Yeah. And I understand that and I
8 realize that the solution that I initially proposed which is if
9 he asks a question that's inappropriate, you can object and
10 I'll sustain it isn't the ideal solution and so if there's
11 another way to handle that, we can certainly think about it.
12 I'll think about it and you-all can think about it as well but
13 I just think -- number one, I don't think you want me sitting
14 down here and trying to suggest what hypotheticals would or
15 wouldn't work because that ain't my job.

16 And, number two, the condition that my brain is in
17 right now probably wouldn't result in anything of any use to
18 anybody, as you can already tell. And then beyond that, you
19 know, I think perhaps the better way to do this, for all of us
20 to think about it a little bit and then write an order and see
21 how we can handle it in such a way that bells don't get rung
22 that can't be un-rung but at the same time, we have a path.

23 **MR. SCHUMACHER:** Sure. And certainly, you know, our
24 concern is, as we've discussed, and all of us here have been
25 doing toxic tort litigation for quite a while. So it's --

1 **THE COURT:** No, I know I'm the Junior Joe on the
2 totem pole.

3 **MR. SCHUMACHER:** -- it's very easy for us to split
4 those hairs very finely. So, you know, when we start talking
5 general versus specific causation where that line gets drawn.
6 But we'll deal with it at a later point. So I understand the
7 ruling is Drs. Anderson and Staggs may testify about general
8 causation and not specific.

9 **THE COURT:** That's the ruling for today and I am more
10 than happy to accept any and all suggestions that you-all think
11 of and when you're a little less tired of listening to me about
12 how we might deal with the issue.

13 **MR. SCHUMACHER:** Thank you, Your Honor.

14 **MR. MC COY:** Judge, on the Garza motion to
15 reconsider --

16 **THE COURT:** Yes, sir.

17 **MR. MC COY:** -- I've got a lot of commitments in
18 January on all kinds of things.

19 **THE COURT:** Okay.

20 **MR. MC COY:** Can I have 30 days to file that?

21 **THE COURT:** I'm sorry. I'm hesitating because I've
22 forgotten what day of the week it is now or what day it is.

23 **MR. MC COY:** It's the 4th.

24 **THE COURT:** Yeah, it's the 4th, right. Yeah, so like
25 February 5th?

1 **MR. MC COY:** Yes.

2 **THE COURT:** Yes.

3 **MR. MC COY:** Thank you.

4 **THE COURT:** That's fine. And then I'm assuming the
5 Defendants will want to respond to it?

6 **MR. SPEAKER:** Certainly.

7 **THE COURT:** You think two weeks will be --

8 **MR. SPEAKER:** That's sufficient.

9 **THE COURT:** Okay, February 16th. Thank you for that
10 reminder, Mr. McCoy.

11 Okay. Anything else that you think we ought to
12 address or that you think I'm capable of addressing before we
13 move to motions in limine? No? Okay.

14 All right. So let's change tacks a little --

15 Joan, do you need water?

16 **MS. SPEAKER:** I'm sorry.

17 **THE COURT:** I'll get you -- the bubbler -- thank you,
18 guys. I appreciate that.

19 **MS. SPEAKER:** Okay, thank you.

20 **THE COURT:** I'm finding my place anyway. So --

21 **(Discussion off the record)**

22 **THE COURT:** So let's start with Sprinkmann and
23 Wisconsin Electric and Employers' motions in limine which are
24 at Docket Number 125 of the 2010 docket. There are several
25 motions that -- it's a combined set of motions in limine. So

1 I'm going to use the numbers that are in the motion itself.

2 Motion Number 1 asks that I order that the Plaintiff
3 not be allowed to make any reference to liability insurance.
4 The Plaintiff responded that the Plaintiff does not oppose that
5 motion. So I will grant that motion.

6 The second one -- the second motion within Docket
7 Number 125 is a motion asking to exclude references to other
8 actions against Sprinkmann and against WEPCO. Basically, the
9 Defendants argue that Ms. Ahnert may try to introduce evidence
10 regarding other personal injury lawsuits that have been brought
11 against Sprinkmann and WEPCO and they argue that under 403, the
12 evidence is relevant -- irrelevant -- excuse me -- and also
13 that the -- any probative value it might have would be
14 outweighed by the prejudice.

15 Ms. Ahnert responded, no objection as long as we can
16 still -- and I think I'm understanding this correctly,
17 Mr. McCoy -- as long as this doesn't limit any impeachment that
18 we may want to do based on prior testimony. For example, if a
19 witness climbs up on the stand and says something that's
20 directly opposite to what they said in a prior testimony --
21 deposition under oath or a prior evidentiary-type hearing under
22 oath, the Plaintiff would want to reserve the ability to use
23 that for impeachment. Am I understanding that correctly,
24 Mr. McCoy?

25 MR. MC COY: I think that's correct, Judge. Sorry,

1 I've got more than one thought on that one going in but that's
2 correct, yes, on this one.

3 **THE COURT:** Okay. Any disagreement that people can
4 use prior inconsistent testimony for impeachment but otherwise
5 no reference?

6 **MR. MC COY:** No.

7 **THE COURT:** Okay. I'll grant that motion and I'll
8 also note that even in an impeachment context, I think it's
9 important at trial that if a party wants to use testimony from
10 another case that that impeachment be framed in terms of, do
11 you recall giving your deposition or do you recall testifying
12 on thus and such a date. I don't think anybody needs to go
13 into any details about, you know, when you guys got sued in
14 thus and such State court for this and that. It simply can be
15 a reference to the date of the testimony and the fact that it
16 was under oath and then ask the questions.

17 The third motion in that packet is a request to
18 preclude the Plaintiff from referring to other Sprinkmann
19 companies that may be outside of the state of Wisconsin and I
20 think, as I understand it, there's Sprinkmann Sons in Minnesota
21 and then there's in Illinois.

22 **MR. SPEAKER:** There were, yes.

23 **THE COURT:** There were?

24 **MR. SPEAKER:** Yes.

25 **THE COURT:** Okay. No longer, so I apologize. And

1 neither of those have been named in party in this court and in
2 this lawsuit and Sprinkmann and WEPCO argue that there were
3 different boards of directors, there were different entities in
4 place. The Plaintiff responds and says that back in 1962,
5 there was a claim filed by somebody in the Sprinkmann Minnesota
6 entity, a workers' compensation for asbestos and the
7 Plaintiffs' argument basically is that that should have given
8 Sprinkmann some notice as far as long ago as 1962 that asbestos
9 was a problem, that it had asbestos issues.

10 So anything to add to your objection, Mr. McCoy?

11 **MR. MC COY:** No, that's the objection. It's
12 relevant.

13 **THE COURT:** Okay. Mr. Rhoades, do you want to
14 respond?

15 **MR. RHOADES:** Other than the claim made against a
16 separate corporation unless there's some evidence connecting
17 the two shouldn't --

18 **THE COURT:** And so -- I mean, what is the connection
19 between the Minnesota entity and the Sprinkmann here?

20 **MR. RHOADES:** Oh, I mean, the -- it's a hundred-and-
21 fifty-year-old story at this time, Your Honor.

22 **THE COURT:** Oh, sorry.

23 **MR. RHOADES:** It's a company that was started in 1888
24 by members of the family and the family grew and they expanded
25 and moved. They had operations in some different states and so

1 they incorporated some entities in different states and those
2 entities were managed sometimes by members of the Sprinkmann
3 family and sometimes by other folks and at different points in
4 time, those entities were sold to the other folks.

5 **THE COURT:** Okay. And so I know that we're going
6 back a ways but isn't the time of the events to the extent that
7 we can pinpoint a time period with regard to Mr. Ahnert -- or
8 have these already been sold to other owners?

9 **MR. RHOADES:** Well, with respect to the claims for
10 exposure in the 60s, no.

11 **THE COURT:** Okay.

12 **MR. RHOADES:** With respect for the claims for
13 exposure in 1989, yes. We have two different -- you may recall
14 we have the two different sets of evidence --

15 **THE COURT:** Right, right.

16 **MR. RHOADES:** -- in these cases.

17 **MR. MC COY:** The relevant timeframe though is the
18 early 60s when they had knowledge.

19 **THE COURT:** But that's irrelevant if by the time
20 Mr. Ahnert arguably was exposed, the owner of that -- there was
21 a different owner of the Wisconsin Sprinkmann who had no
22 relationship to the owner of the Minnesota Sprinkmann who would
23 have gotten notice in the 60s.

24 **MR. MC COY:** Well, the knowledge and the notice they
25 got in the 60s carried forward for Ahnert's exposures caused by

1 a Sprinkmann product.

2 **THE COURT:** Not -- I get --

3 **MR. MC COY:** No --

4 **THE COURT:** -- if it was the same -- if the same
5 entity or human got notice in 1962 and still was the owner of
6 Sprinkmann Wisconsin in 1989, then, yes, I would agree with
7 you --

8 **MR. MC COY:** Yeah --

9 **THE COURT:** -- but that's what I'm asking.

10 **MR. MC COY:** -- the family was still the owner, the
11 same Sprinkmann family.

12 **THE COURT:** Okay. Well, you're both saying two
13 different things. So I think we'll table this one and I'll be
14 asking you-all for information about ownership in the 80s.

15 Oops, I put my note in the wrong place, sorry.

16 The fourth motion in this packet is to preclude
17 introduction of any worker compensation records. The
18 Defendants are asking that I not allow the Plaintiff to put in
19 any records to show that Sprinkmann had notice of the alleged
20 danger of insulation products. The argument here is that
21 because asbestos are dose-response diseases, it's different for
22 an employee handling the asbestos and a bystander and the
23 information that somebody filed a workers' compensation claim
24 doesn't have any relevance to the question of whether or not
25 the company had any notice of potential hazards of asbestos

1 products.

2 There are not any records, as far as I understand,
3 relating to WEPCO. So it's moot as to WEPCO. I think the only
4 issue is with regard to Sprinkmann and in that regard, the
5 Plaintiff indicates that there's six worker compensation claims
6 that were filed against "Sprinkmann entities." I think this
7 raises the same issue as the last one because the question is
8 whether or not it's the same people or group of people who had
9 this notice.

10 I think there is some tangential relevance. I don't
11 think there's a lot but arguably under 403, there's some
12 tangential relevance but I think the first issue, again, is
13 whether or not whoever got notice of these workers' comp claims
14 against Sprinkmann was the same person who would have had
15 reason to know that there was asbestos or there were problems
16 with asbestos at the time Mr. Ahnert arguably was exposed. So
17 I'll put that in the same category as the previous one.

18 **MR. MC COY:** And, Judge, just one other point and I
19 understand that's being referred to but the Sprinkmann
20 exposures for Ahnert -- I believe the evidence is -- began at
21 least in the 60s, if not earlier.

22 **THE COURT:** Okay. Well, I mean, I'll give you-all an
23 opportunity to tell me that, too. I'll be totally frank with
24 you. At this point in time, I don't recall exactly. When I
25 was working on summary judgment motions, I remembered which

1 dates and which.

2 **MR. MC COY:** Yeah, this --

3 **THE COURT:** Now I can't remember quite what I had for
4 breakfast.

5 **MR. MC COY:** Right. And you --

6 **THE COURT:** So I'll give you-all a chance to share
7 that if that's the case because I think that's relevant.

8 The fifth motion in that packet is a motion to
9 preclude the Plaintiff from presenting evidence of disease in
10 individuals other than Mr. Ahnert and it seems like they're --
11 in the response -- both the argument and the response, it seems
12 like there are two possible different issues here. The first
13 issue is whether or not they can -- the Plaintiff can introduce
14 evidence that other people who may have worked with Mr. Ahnert
15 on any of these projects had asbestosis and then --

16 **MR. MC COY:** We're not doing that.

17 **THE COURT:** Okay. Then that's what I wanted to make
18 sure. That's -- because that's number one. I was going to
19 say, I think that is irrelevant and shouldn't come in. But
20 then what I was going to say, the other side of the coin is the
21 one that the Plaintiff raises which is, but, you know, wait a
22 minute. If I want to say that there are studies out there that
23 show that asbestos causes mesothelioma, then by virtue of
24 saying that, I have to say that other people suffered from this
25 disease. I can't even refer to a study if I can't refer to the

1 fact that people had diseases. I didn't understand that to be
2 the target of the motion. Am I correct?

3 **MR. MC COY:** That's correct.

4 **THE COURT:** Okay. All right. So what we're talking
5 about here is referring to specific human beings who might have
6 worked with or around Mr. Ahnert at the same time that
7 Mr. Ahnert allegedly was exposed. There's also -- and I think
8 that's absolutely correct. The Plaintiff says the Plaintiff is
9 not going to be raising that or introducing evidence about that
10 and I wouldn't allow it if they were.

11 There's also -- the Plaintiff makes a comment that
12 Ernest Sprinkmann, who was formerly the president of
13 Sprinkmann, died of mesothelioma in 1968 and that a Sprinkmann
14 employee testified that company employees heard somewhere in
15 the 1960s that the owners had spots on their lungs -- no, no.
16 No, no, neither one of those am I going to allow testimony
17 about. That is, as to the second point, complete and utter
18 hearsay and hearsay that does -- isn't even attributed to an
19 identifiable person. And with regard to Ernest Sprinkmann, the
20 fact that he's president of Sprinkmann is not enough to make it
21 relevant. So I'm not going to allow that.

22 Number six in the packet is a request that I exclude
23 invoices, material registers, sales documents or purchase
24 orders, in particular, any of those types of documents that
25 would show that either Sprinkmann or WEPCO had purchased

1 products, I think, that might have fibers in them and the
2 argument here is that this is pure speculation, that if there
3 were purchase orders and things like that that were put in to
4 show that they bought items that had asbestos in them that the
5 jury were being asked -- would be asked to speculate that,
6 okay, so that must establish cause.

7 I'm -- to be honest, I'm a little bit confused about
8 this one. I didn't know that there was a dispute that there
9 was asbestos at any of these sites. Is that a disputed fact?

10 **MR. SPEAKER:** You mean -- no, we're not going to
11 dispute that there was asbestos containing insulation at the
12 Oak Creek power plant. I think the concern is that there may
13 be, you know, an ocean of invoices over a period of years that
14 might present a picture to the jury that, you know, he must --

15 **THE COURT:** The place was crawling with it?

16 **MR. SPEAKER:** -- he must have been, you know, despite
17 the fact that there's no direct evidence that links the man to
18 any of those products.

19 **THE COURT:** So --

20 **MR. SPEAKER:** So that's the concern.

21 **THE COURT:** Okay. So what -- Mr. McCoy, what are --
22 what's the purpose of -- if you are planning on it? I mean,
23 you objected to this. So --

24 **MR. MC COY:** Yeah, that the sales records were being
25 offered to show just how much asbestos that there was at WEPCO.

1 I'm not clear about this -- this stipulation. I mean, if
2 they're saying that it's all asbestos on all the piping, we
3 still have the question of what portion of that was
4 Sprinkmann's. And basically, that the sales records establish
5 that it was all Sprinkmann's. I mean, there's no -- there's
6 really no other records that we have to show anybody else's
7 asbestos.

8 So -- so it's not just that there's asbestos at the
9 WEPCO facility, it's that it's Sprinkmann's asbestos.

10 **THE COURT:** Well, I mean, I -- on the one hand, I
11 think you have -- the Plaintiff has a right to try to prove
12 that the Defendant is somebody who was involved in the alleged
13 behavior. On the other hand, I -- I don't want this to turn
14 into a trial about how many purchases were made and -- I mean,
15 what are we talking about in numbers here, Mr. McCoy? What
16 kind -- how many documents have you got?

17 **MR. MC COY:** Normally we'd just introduce a summary,
18 but -- but there's certainly thousands of these records. I
19 mean, for WEPCO, for Pabst, there's -- it's just -- that's --
20 Sprinkmann had all the work. I mean, that's the whole point of
21 these invoices is to establish that it's all Sprinkmann's
22 asbestos.

23 **THE COURT:** Well --

24 **MR. MC COY:** That's -- that's the only way we can do
25 it, by showing this is what they sold and delivered to -- to

1 these places. I could say, depending on what the stipulation
2 might be, you wouldn't have to use it, but certainly you'd
3 just -- you know, you'd only introduce the summary of what's in
4 those records.

5 **THE COURT:** And I defer --

6 **MR. MC COY:** Like -- like at Oak Creek, there's seven
7 football fields of asbestos. I mean, it's from Sprinkmann.

8 **THE COURT:** I'm going to defer ruling on it until
9 such time as the Plaintiff provides the Defendants with
10 information about certainly the summary and what -- what
11 exactly it is that's going to be presented to the jury. As
12 Mr. McCoy hints, there may be some stipulation that the parties
13 reach. I am guessing that Sprinkmann is not going to agree
14 about football fields, but there may be some agreement that the
15 parties can come to. If not, then I'll look at the summary and
16 I'll see whether or not I'm going to allow it. So I'll defer
17 ruling on that one.

18 Number 7, the Defendants asked to prohibit the
19 Plaintiff from using, in front of the jury, the terms "asbestos
20 industry" or "members of the asbestos industry," arguing
21 basically that Sprinkmann, in particular, and -- was not an
22 asbestos manufacturer, was not an asbestos installer, or
23 whatever else. And WEPCO, of course, is an electric company.
24 And so, using that terminology would be inappropriate.

25 The Plaintiff responds, Sprinkmann's business

1 involved a high percentage of asbestos-containing materials and
2 it employed members of an asbestos workers' union. I -- I
3 don't -- I don't think that makes Sprinkmann a member of the
4 asbestos industry. That phrase or that terminology refers to
5 people who manufacture it, people who install it, companies who
6 install it, and companies who manufacture it -- maybe companies
7 who remove it. I don't know whatever else, but I -- I don't
8 think it's appropriate to refer to Sprinkmann.

9 It doesn't apply as to WEPCO. I don't think the
10 Plaintiff is proposing it as to WEPCO. But as to Sprinkmann, I
11 don't -- I'm not going to allow reference to Sprinkmann as a
12 member of the asbestos industry or as an asbestos company. I
13 think that's misleading, if -- among other things.

14 Was there asbestos on the premises? Certainly that's
15 going to be argued, and I understand that, but that's not the
16 same thing as being a member of the asbestos industry, even if
17 you employ people who are part of a union.

18 Number 8 in that packet is -- is a motion and it's
19 entitled, "Wisconsin law dictates that all potentially
20 responsible parties be included on the special verdict form."
21 I think this is a premature motion. Until I know what the
22 evidence is that comes in, I don't know what parties are going
23 to need to be included on the special verdict form. And so, I
24 think we should take that out.

25 Once we hear how the evidence comes in, who the

1 parties are that the evidence related to, and then we can
2 determine that. And believe you me, we'll spend some time
3 talking about the verdict form, probably even before we talk
4 about jury instructions.

5 So that takes care, I believe, of all the motions in
6 Docket Number 125.

7 And Pabst filed some consolidated motions in limine
8 in Docket Number 126. Again, I'll go through and use the
9 numbers, because it's a number of motions.

10 Number 1, the Plaintiffs make a standard -- I mean
11 the Defendants, sorry, makes a standard exclusion request that
12 any witness who's not a party representative be outside the
13 courtroom until it's his or her time to testify. Plaintiff
14 doesn't seem to object, as long as everybody follows that same
15 rule. And so, that's fine. We've got witness rooms out there.
16 We always have them open. So people can cool their heels out
17 there and then wait to be called. So I'll grant that motion.

18 The second motion in the Pabst package as -- as
19 Mr. McCoy indicated, a number of these overlapped, and Pabst
20 also asked that I exclude any reference to "insurance." And as
21 I indicated earlier with regard to the other Defendants, the
22 Plaintiff doesn't oppose that, so I'll grant that motion.

23 The third motion is a motion that I preclude any
24 reference to Ms. Ahnert's health situations, particularly her
25 breast cancer and her overall health. And again, the

1 Plaintiffs said, "Fine with us, as long as you abide by the
2 same rule," and I'm sure the Defendants don't have any intent
3 on raising those issues. And so I'll grant that motion as
4 well -- I mean, that's with regard to everybody, obviously.

5 The fourth motion is the one that we talked about
6 earlier which is the request that I exclude any references to
7 lawsuits -- other lawsuits against Pabst. I think that falls
8 into the same category as the request to exclude reference to
9 other lawsuits against the other two Defendants. And I think
10 we've already resolved that, which is that prior inconsistent
11 testimony can be used to impeach, but otherwise no reference to
12 prior -- to other lawsuits with regard to Pabst or WEPCO or
13 Sprinkmann.

14 The fifth motion is, again, similar to the ones that
15 the other Defendants brought. "Motion to preclude the
16 Plaintiff from presenting evidence of disease in individuals,
17 other than Mr. Ahnert." I think we resolved that. And no
18 evidence of disease in other co-workers, members of the
19 Sprinkmann family, anything of that nature. But, again, if any
20 party wants to refer to studies which obviously involve other
21 human beings who have these diseases, then they can certainly
22 do that.

23 Number 6 -- the sixth one is the same as the one that
24 I just ruled on with regard to Sprinkmann and WEPCO, and that's
25 to prohibit any reference to Pabst as either a member of the

1 asbestos industry or as an asbestos company. And the Plaintiff
2 didn't oppose that one as to Pabst, and I've already ruled on
3 it as to the other Defendants.

4 The seventh motion that Pabst brings is asking me to
5 exclude any reference or comments along the lines of something
6 like, "Pabst profits at the expenses of others," or, you know,
7 it -- "It's on the backs of other people's injuries."
8 Plaintiff does not propose to do that, and so I'll grant that
9 motion.

10 The eighth motion is asking that I exclude reference
11 to and comments regarding any attempts to settle that have
12 taken place over the course of years. I think that's already
13 pretty clear from the rules of evidence that it's not allowed.
14 And the Plaintiff doesn't oppose it, so I will grant that
15 motion. And, of course, that applies to everybody, no
16 references to settlement attempts or settlement discussions.

17 Number 9, the ninth motion asks that the Plaintiff
18 not make any reference to the fact that Pabst may not have a
19 corporate representative present at the trial. And the
20 Plaintiff doesn't oppose that, so I will grant that motion.

21 Number 10 asks that I exclude reference to the number
22 of asbestos-related Workers' Compensation claims filed against
23 Pabst. The Plaintiff says that's moot. I don't know if that
24 means there haven't been any Workers' Compensation claims or --
25 but it doesn't seem to be opposed, so I'll grant the motion --

1 oh, no, just says "not opposed." I apologize.

2 **MR. MC COY:** We don't have any comp claims we know of
3 against Pabst.

4 **THE COURT:** Okay. Well, then, I'll grant that
5 motion.

6 Motion Number 11 -- yes. Motion Number 11 asks that
7 I exclude reference to the use of -- or allow the use -- not
8 allow the use of any prior deposition testimony, unless Pabst
9 was present and had the opportunity to object or cross examine
10 the witnesses, and the Plaintiffs show the relevance of the
11 deposition testimony and the materiality.

12 Right now nobody's designated any deposition
13 testimony, so if -- let's wait and see what gets designated.
14 And if anything like that gets designated, then I will rule on
15 it at that point in time.

16 The twelfth motion asks that I exclude demonstrative
17 evidence involving asbestos-containing products that the
18 Plaintiff didn't use -- Mr. Ahnert didn't use or that he didn't
19 have any contact with. The Plaintiff opposes this saying that
20 it's relevant because it could have to do with bystander
21 exposure from co-workers, removal exposure, exposures through
22 drifts, suspension. There are other ways that he could have
23 been exposed to this; and that the Plaintiffs' experts provide
24 the foundation for that evidence. And
25 Dr. Anderson discusses bystander exposure.

1 I've already made a ruling on the experts, and none
2 of them are going to be going specifically into a causal link
3 between what happened to Mr. Ahnert and the condition of the
4 premises. So I'm not sure -- I'm not sure how this is relevant
5 anymore.

6 Mr. McCoy?

7 **MR. MC COY:** Demonstrative evidence -- I guess we
8 wouldn't. We don't have any demonstrative evidence on that.

9 **THE COURT:** So you're not going to bring in a chunk
10 of pipe and go, "This is what this looks like," or --

11 **MR. MC COY:** Right.

12 **THE COURT:** Okay. Then --

13 **MR. MC COY:** I mean, actually that probably should
14 have been -- I'm reading some shorthand summary of this, but
15 probably should not have been opposed.

16 **THE COURT:** Okay. Then I will grant that motion as
17 well.

18 Number 13 asks me to exclude any reference or comment
19 by lay witnesses as to the cause of Mr. Ahnert's injury. I've
20 already ruled on that with regard to the other Defendants.
21 I'll grant that motion. And the Plaintiff didn't oppose it.

22 Number 14 asks me to exclude any evidence of co-
23 workers' injuries or deaths related to asbestos exposure. I
24 think we've already covered that, and the Plaintiff is not
25 proposing to introduce any evidence as to co-workers. And so

1 I'll grant that motion.

2 Number 15 asks me to exclude references to or
3 comments on the knowledge or information or documents possessed
4 by trade organizations and industry groups that Pabst is not a
5 part of, which has the effect of imputing knowledge of the
6 purported hazardous asbestos exposure to Pabst.

7 At this point in time, I don't have any idea whether
8 or not the Plaintiffs plan to introduce any of that kind of
9 evidence, but particularly as it relates to "Safe Place,"
10 there's a knew or should have known element to that. And
11 information that is out there that could be available to Pabst,
12 I think would be relevant.

13 Now, trade organizations that it wasn't a member of
14 or didn't have any way of knowing anything about, I guess that
15 wouldn't be relevant, and I won't know until we know whether
16 the Plaintiffs are planning on -- or Plaintiff is planning on
17 putting anything into that regard. But just as a general
18 motion -- a general notion, I would say that since "Safe Place"
19 is in here, there is some requirement that the Plaintiff has to
20 prove that the Defendants knew or should have known that
21 asbestos was dangerous. And so, I can anticipate that there
22 may be evidence about what the status of information was at
23 that time.

24 So I'll reserve ruling on any specific documents. We
25 can look at those once the Plaintiff has made a proposal as to

1 what -- or, submitted an exhibit list, I suppose.

2 Sixteen asks me to exclude any reference or comment
3 concerning the amount of money or time spent by the Defendant
4 in -- in defending the matter. And the Plaintiff doesn't
5 oppose that, so I will grant that motion.

6 Seventeen asks me to exclude reference to or comments
7 that label defense counsel as asbestos lawyers or -- oh, I'm
8 sorry. Am I on 17? Yes.

9 **MR. SCHUMACHER:** Yes.

10 **THE COURT:** Asbestos -- thank you -- asbestos lawyers
11 or asbestos defense lawyers and label the Plaintiffs as
12 asbestos victims. And the response to that from the Plaintiff
13 is that we don't have any problem not calling you asbestos
14 defense attorneys. They want to call Mr. Ahnert an asbestos
15 victim because he died of mesothelioma. I -- I think calling
16 him an asbestos victim draws a conclusion that is the very
17 point of what we're talking about here. I mean, there won't be
18 any dispute, I would guess, that he died of mesothelioma,
19 because that's what the coroner concluded, but to draw that
20 link between asbestos and, in particular, be drawing a link I
21 think between these Defendants, and any asbestos that may have
22 been on their premises and Mr. Ahnert is inappropriate. And I
23 also think it's, in some respects, unduly inflammatory. So I
24 will grant that motion and I will not allow reference to
25 Mr. Ahnert as an asbestos victim. There are all sorts of other

1 ways that he can be referred to, but not as an asbestos victim.

2 Number 18 asks me to exclude mentioning reference or
3 introducing evidence of any prior action and/or omission on the
4 part of Pabst that isn't directly related to the incident at
5 issue. I -- I don't know how to even rule on that right now.
6 It's a 403 issue. And I think the best thing to do with that
7 is if Pabst knows of any specific incidents that the Plaintiff
8 might be referring to, certainly it can raise those with me
9 before trial and we can talk about them before trial. And if
10 something comes up during trial, I can do a 403 analysis at
11 that point. But I -- I'm kind of in a vacuum on this one at
12 this point. So I'm going to defer ruling on that until
13 something specific comes up at trial.

14 The next two, 19 and 20, are kind of related to each
15 other. Nineteen asks me to exclude mentioning, referencing, or
16 introducing evidence of any subsequent remedial measures or
17 actions. I think the rules already kind of talk about that.
18 Those are -- that is not allowed, and so I will grant that
19 motion.

20 And then with regard to Number 20 --

21 **MR. MC COY:** There's a Wisconsin statute where
22 Wisconsin has a rule on the Safe Place Act scenario.

23 **THE COURT:** Okay.

24 **MR. MC COY:** I mean, I -- I don't --

25 **THE COURT:** I'm sorry, I missed that.

1 **MR. MC COY:** -- know how that plays out in Federal
2 Court, but it seems like it ought to be followed in the same
3 way that the same information can come in. I mean, there's a
4 general recognition that it's allowed for Safe Place Act claims
5 subsequent remedial evidence, like an exception.

6 **THE COURT:** All right. Then let me look at that. I
7 didn't -- I somehow missed that.

8 **MR. MC COY:** You know, if we didn't put it in our
9 briefing -- I thought we did, but --

10 **THE COURT:** Well, you may have done. I mean, I --
11 it's been a little stack of paper.

12 **MR. MC COY:** Yeah.

13 **MR. SCHUMACHER:** So is it safe to say you're
14 deferring 19 at the moment?

15 **THE COURT:** Yes, that is safe.

16 Twenty, to exclude evidence of conditions at the
17 Defendant's premises, other than where the Defendant worked.
18 That's where my notes are. Oh, okay. So I think what we're
19 talking about here is Federal Rule 407. And in Federal
20 Court -- and let's set aside the Safe Place Act for a second --
21 in Federal Court, "Subsequent remedial measures may be offered
22 for other purposes" -- in other words, to show who owns the
23 property, to show who controls the property, things of that
24 nature can be used for impeachment.

25 And then it says, "Approving a violation of the

1 Wisconsin Statute 101.11, the Safe Place Act." So I think the
2 subsequent remedial measures issue with regard to the Safe
3 Place Act, Mr. McCoy is right -- and you did put it in your
4 brief, and I apologize.

5 And then with regard to the other claims, it is not
6 relevant. And I think we're probably going to need to come up
7 with some sort of language to make clear to the jury that it is
8 relevant only as to "Safe Place." And that's something that we
9 can talk about as we get closer to it.

10 Do you have a question, Mr. Schumacher?

11 **MR. SCHUMACHER:** Yeah, I just want to -- sorry to be
12 all schoolboy back here.

13 **THE COURT:** No. That's okay.

14 **MR. SCHUMACHER:** But I just want to make sure I
15 understand. So it sounds like we went back to 19 --

16 **THE COURT:** We did go back to 19 because I didn't
17 realize that I had put my notes --

18 **MR. SCHUMACHER:** -- and we're granting it, but only
19 insofar as it relates to --

20 **THE COURT:** "Safe Place."

21 **MR. SCHUMACHER:** -- the Safe Place Statute.

22 **THE COURT:** Right. Because otherwise under Rule 407,
23 with regard to the other claims, it can only come in for other
24 purposes, such as to prove ownership, which I am guessing is
25 not an issue; to prove control, which I am guessing is not an

1 issue for impeachment. It's only allowed for very limited
2 purposes under Federal Rule of Evidence 407. So, unless any of
3 those circumstances exist, it's not relevant to anything other
4 than "Safe Place."

5 **MR. SCHUMACHER:** And is that -- is that the same
6 ruling with regard to 20 or --

7 **THE COURT:** Well, I mean, I understood the motion
8 about conditions of the Defendant's premises, other than where
9 the Plaintiff allegedly worked -- oh, sorry, no. No. Twenty
10 is places other than where the Plaintiff worked, and that
11 motion I'm granting. Yeah. Sorry.

12 **MR. SCHUMACHER:** Okay. That's why I got confused,
13 because you started talking about "Safe Place," we talked about
14 20, and I was going to start to say, I'm not seeing the --

15 **THE COURT:** And it's just because --

16 **MR. SCHUMACHER:** Yeah.

17 **THE COURT:** There isn't, and it's because I laid out
18 my notes badly. I'm sorry.

19 **MR. SCHUMACHER:** No. That's fine.

20 **THE COURT:** All right. Twenty-one asks me to exclude
21 any mention or reference to post-exposure evidence on direct
22 examination. I don't know -- I'm not sure whether that's
23 anything that the Plaintiff is planning on doing or not. I
24 don't see how post-exposure evidence would be relevant. If
25 there's any particular document or something that Pabst is

1 aware of that the Plaintiff's going to try to use, certainly
2 I'll consider that. But at this point, I don't see any reason
3 that post-exposure evidence should be relevant.

4 Were you planning to submit evidence of that,
5 Mr. McCoy?

6 **MR. MC COY:** At the moment, I can't think of any
7 evidence.

8 **THE COURT:** Okay. Then I'll grant that motion as
9 well.

10 Twenty-two asks me to exclude any reference to or
11 comment on the financial condition of Pabst in the Plaintiffs'
12 case in chief or any -- any other time. And the only way, as I
13 think the Plaintiff concedes that that could be relevant, I
14 think, is with regard to punitive damages, if we even get
15 there. And we're way too far out to know whether we even get
16 there.

17 So I will grant the motion to that extent, and then
18 reserve discussion of whether or not we get to punitive
19 damages -- and if we do, Pabst's financial condition at that
20 point.

21 Twenty-three asks me to exclude -- this is the
22 purchase orders and receipts motion that Sprinkmann and WEPCO
23 have already filed. And as I indicated, I need more
24 information on -- on what the summary will be. So I will defer
25 ruling on that until I know what exactly we're talking about

1 here.

2 Twenty-four asks me to exclude all anecdotal
3 testimony or documents concerning product use, bodily injury,
4 death, causation, or other condition related to asbestos-
5 related injuries. I don't think anecdotal evidence has much of
6 a place at all. I don't know if the Plaintiff was planning to
7 put any in, but I -- I will generally grant that motion. If
8 something specific comes up at trial and there's an argument
9 about whether it's anecdotal or otherwise, I'll take that up
10 when we get to it.

11 And then 25 asks me to exclude imputed knowledge of
12 the purported hazards of asbestos exposure to this Defendant.
13 And the Defendant indicates -- Pabst indicates here that --
14 thinks that the Plaintiff might be planning to submit some kind
15 of evidence or introduce evidence that other companies, other
16 kinds of industries had extensive knowledge about asbestos
17 hazard in the years that led up to Mr. Ahnert's exposure; and
18 that they might try to say somehow or another that Pabst should
19 have known about that information from these other industries.

20 I think this is similar to the "trade association
21 that I'm not a member of" motion, that -- that Sprinkmann and
22 WEPCO filed. And as I indicated earlier, I think certainly,
23 and with regard to "Safe Place," it is going to have some
24 relevance as to whether or not there was information out there
25 that Pabst knew or should have known as to any specific trade

1 organization or industry or that Pabst may argue, "Well, we
2 didn't have any contact with them," or, "We didn't know
3 anything," or, "Have no way to know anything." I'll take that
4 up when we get closer to trial.

5 Twenty-six asks to exclude any testimony by
6 Mr. William LaPointe. He hasn't offered any opinions with
7 regard to Pabst, and I haven't been provided any information
8 and -- and the Plaintiff says not -- we -- we agree. It
9 doesn't have any opinions about Mr. Ahnert's work at Pabst.
10 And so, it's a moot point and I'll grant that motion.

11 And then finally, the last motion, 27, asks to
12 exclude deposition testimony of Mr. Ahnert. And the basis for
13 it is that it isn't a dying declaration. The Plaintiff
14 responded that the Plaintiff was fine with that, but wanted to
15 clarify that what we were talking about was Mr. Ahnert's
16 December 11th, 2010, deposition.

17 Is that -- or do you know off the top of your head,
18 Mr. Schumacher?

19 **MR. MC COY:** Just a statement.

20 **MR. SCHUMACHER:** It's a statement; it's not a
21 deposition. He was never --

22 **THE COURT:** Okay.

23 **MR. SCHUMACHER:** -- he was never put under oath.

24 **THE COURT:** Well, right. I guess you -- he wouldn't
25 have been, right?

1 **MR. SCHUMACHER:** I -- I -- I'm sorry, that's really
2 close. I think that's correct.

3 **THE COURT:** Well, the motion says "deposition
4 testimony."

5 **MR. SCHUMACHER:** Does it really?

6 **MR. RHOADES:** He was put under oath.

7 **THE COURT:** December 11th --

8 **MR. RHOADES:** Mr. McCoy's partner --

9 **MR. MC COY:** It's a -- it's a statement in the sense
10 it's not -- no defense counsel were there. That's why I call
11 it a statement.

12 **MR. SCHUMACHER:** Okay.

13 **MR. MC COY:** It's a statement under oath, but it's
14 not a deposition.

15 **THE COURT:** Oh, so it wasn't subject to questioning?

16 **MR. SCHUMACHER:** Yes, I'm sorry. It's been so long,
17 I'm trying to keep it straight.

18 **THE COURT:** No, no. I know.

19 **MR. SCHUMACHER:** Yeah. It's not an affidavit. He
20 was put under oath, but there was no one there to cross
21 examine.

22 **THE COURT:** Right.

23 **MR. RHOADES:** There was no cross; there were direct
24 questions by the defense counsel.

25 **THE COURT:** Okay. And so, regardless of that fact,

1 is that the statement we're talking about?

2 **MR. SCHUMACHER:** Yes. Yes. That's the statement I'm
3 talking about. I think we probably didn't know what to call
4 it.

5 **THE COURT:** Yeah. And it sounds like to that end,
6 the Plaintiff doesn't have any objection to not putting that
7 in. So I'll grant that motion.

8 **MR. SCHUMACHER:** And there is -- actually, you said
9 "the last one." There is actually one more motion. We just
10 filed it separately because it was longer.

11 **THE COURT:** Oh, no, I'm taking this by docket number.
12 So I -- I think that --

13 **MR. SCHUMACHER:** I see.

14 **THE COURT:** That's the only one in this Docket Number
15 126.

16 **MR. SCHUMACHER:** Yes. I understand.

17 **THE COURT:** That's the way I have them organized.
18 I'm sorry.

19 **MR. SCHUMACHER:** My apologies.

20 **THE COURT:** No, I'm sorry. Mr. Rhoades?

21 **MR. RHOADES:** Your Honor, and I didn't file a
22 response to that motion, and I don't know sitting here today
23 whether I can completely agree with it or not, but it is a
24 statement by Mr. Ahnert taken under oath. So, I don't believe
25 it's hearsay. I'm not sure what the --

1 **THE COURT:** Well, and -- and, so you'll note that I
2 didn't -- I made a comment that the basis for it was it's not a
3 dying declaration. And I didn't make an evidentiary ruling in
4 that regard. And a dying declaration, pretending that we're in
5 law school again, is obviously a statement that someone makes
6 knowing that they're about to die, and it's an exception to the
7 hearsay rule which imputes credibility or reliability of the
8 statement because it assumes that nobody would lie if they knew
9 that they were on the verge of death. And this isn't that; I
10 get it. But there's also Rule 804. And Rule 804 may be the
11 issue that deals with the hearsay problem. And so, if we need
12 to go there, then we can consider 804.

13 **MR. SCHUMACHER:** And just to clarify, that's all
14 Pabst is asking for, really, is just a ruling that this is not
15 a dying declaration.

16 **THE COURT:** As far as I can tell, it's not a dying
17 declaration.

18 Okay. Now, to Mr. Schumacher's point, Docket Number
19 127 is their Motion in Limine, Pabst's Motion in Limine Number
20 28. It's just filed in a separate document. And that motion
21 asks me to exclude the testimony of Ralph Van Beck and Jack
22 Wetzel as to Pabst, and to limit the exposure period at issue
23 as to Pabst to two months between 1955 and 1959.

24 The Plaintiff indicates that nobody's designated Beck
25 or Wetzel's testimony, they're dead, so they're not going to be

1 showing up. And so with respect to excluding it until it's
2 designated, it may not end up being an issue.

3 With regard to the restriction of the time period,
4 the Plaintiff argues -- asks what's the basis for making that
5 restriction? So I guess, you know ...

6 **MR. SCHUMACHER:** The basis, Your Honor, is the actual
7 testimony of Mr. Robert Wolter who testified that at some point
8 between 1955 and 1959 he recalled working with the decedent,
9 Mr. Ahnert, for, and I quote, "a couple of months," at the
10 Pabst Brewery. That's the only evidence in the record with
11 regard to Mr. Ahnert's presence at Pabst.

12 **THE COURT:** And so --

13 **MR. MC COY:** There was more than that. We have a --
14 a footnote that indicates where the additional testimony was,
15 and it talks about it being in the '60s in the testimony of
16 Wolter's deposition. So we have both.

17 **THE COURT:** Are you talking to me or are you talking
18 to Mr. Schumacher, Mr. McCoy?

19 **MR. MC COY:** I'm addressing Your Honor, but I'm
20 addressing his -- his statement that there's no other evidence,
21 other than the '50s. That's just not the case.

22 **THE COURT:** All right. Well, then I will defer
23 ruling on this one and we'll take a look at that, first of all,
24 to find out whether or not even the Plaintiff plans to try to
25 designate Mr. Van Beck or Mr. Wetzel's deposition testimony,

1 but second of all, with regard to the time period. I'm willing
2 to restrict the time period, if that's all the evidence is, but
3 if that's all the evidence is, then I don't know why I need to
4 restrict the time period because there's only evidence as to a
5 short time period. But we can cross that -- that motion in a
6 minute -- cross that -- that motion -- that bridge later.

7 And then the Plaintiff has filed Motions in Limine,
8 this is Docket 129. And I'm going to try to move through these
9 relatively quickly so we can get on with our -- the rest of our
10 evening. Docket Number 29 again is broken up into numbers, and
11 I'll use the same numbers that are in the motion.

12 The first asks me to exclude reference to any
13 affirmative defenses or other legal arguments which are
14 dispositive motions that should have pursued -- that should
15 have been pursued at the summary judgment stage. I'm not
16 entirely sure I understand what that motion is. And the
17 Defendants basically say, "We object because we don't know what
18 defenses -- what motion -- what is it you're seeking to bar."
19 I'm a little confused on that one, Mr. McCoy.

20 **MR. MC COY:** I don't -- I don't know -- I mean, I
21 guess that can just be deferred because I don't know what
22 they're planning to present. But I typically see on the eve of
23 trial what I call dispositive motions about -- about these
24 cases. And, again, whether they're dispositive or not, I guess
25 that -- you don't know until you see it. So right now I don't

1 see any of those.

2 **THE COURT:** Okay. Well, I'm going to deny it. I
3 guess if what I'm hearing you say is sometimes people file
4 something and they stick the words "in limine" after the
5 motion, and then what they file is their summary judgment
6 brief --

7 **MR. MC COY:** Right.

8 **THE COURT:** -- I've seen that once or twice myself
9 and I've looked at people and said, "Huh-huh, that deadline
10 came and went." Right now the motions that I have in front of
11 me don't fit that description. So if something gets filed five
12 minutes before we call in the jury or a day before we call in
13 the jury, I'll cross that bridge when we get to it. But I'll
14 deny the motion in general for now.

15 The second motion is that the -- that I preclude any
16 evidence that the Plaintiff made claims against the Defendants
17 who were granted summary judgment in this case. The Defendants
18 oppose that motion unless the reason that the summary judgment
19 was granted was on the merits basically -- an argument that
20 there could be no exposure to asbestos attributable to that
21 Defendant. And the Defendants note that there have been a
22 number of folks in this case who were dismissed either because
23 they agreed to be dismissed and there was a stipulation, or
24 because there was an unopposed Motion for Summary Judgment,
25 which really didn't get any treatment, in terms of the merits

1 or anything of that nature.

2 And so, the -- the Defendants say, you know, "Fine.
3 If the determination of summary judgment was based on the
4 actual merits. But if it wasn't, then that's not relevant."
5 And I -- I agree with that. I don't -- I will deny that
6 motion, unless the particular Defendant in question was awarded
7 summary judgment on the basis there couldn't have been any
8 exposure attributable to that Defendant.

9 The third motion asks that I preclude all asbestos
10 exposure evidence or -- well, what it says is, "All exposure
11 evidence is admissible to prove the cause of any of Daniel
12 Ahnert's asbestos-related conditions." The way that's phrased
13 I was a little confused about, but then there's an explanation
14 which says, "The Defendants likely will move or argue to
15 exclude certain events or seek a limiting instruction from one
16 of the consolidated cases, because disclosure of evidence by
17 the Plaintiff was allegedly improper or untimely." And I guess
18 this relates to the fact that there's a consolidation and there
19 were two different schedules, two different timelines, I think.

20 **MR. MC COY:** Two -- yeah, more specifically, two
21 different judges -- well, that you were preceded by other
22 judges, but different judges ruling on the 2010 case and the
23 2013 case. So that -- that created some -- that created this
24 situation here.

25 **THE COURT:** So, is what you're saying, Mr. McCoy,

1 that they ought not be able to object to admission of evidence
2 because, for example, the evidence wasn't turned over under the
3 2010 scheduling order, but it was turned in under the 2013 case
4 scheduling order? So it was timely under one, but not under
5 the other?

6 **MR. MC COY:** That -- that's correct. And, let's see
7 this.

8 **(Pause)**

9 **MR. MC COY:** Yeah, that's an accurate statement, I
10 think, Judge. But I would also add that not every witness has
11 to be deposed in the case. So if somebody wasn't deposed, that
12 was listed as a witness in the 2010 case, but was not deposed
13 until the 2013 case, there's still that -- that's a disclosed
14 witness for both cases.

15 **THE COURT:** Well, I'm going to defer ruling on this
16 one. I can't -- I mean, there are a million different
17 permutations of how this could and couldn't come up. And the
18 answer to that particular question would depend entirely on
19 what the evidence is and when it came in. And there -- I
20 guess, there could be evidence it was turned over untimely
21 under either schedule; there could be evidence it was turned in
22 timely under both. There was, I mean, I don't see any way to
23 make a blanket ruling on this. Mr. Rhoades?

24 **MR. RHOADES:** Your Honor, this is a specific issue
25 and I'm happy to spend time talking about it now or if you'd

1 like us to just kind of clarify it in a supplemental brief on
2 this. It really relates to Charles Lewitzke's testimony.

3 **THE COURT:** Okay.

4 **MR. RHOADES:** He was barred from testimony --

5 **THE COURT:** Okay.

6 **MR. RHOADES:** -- from testifying or offering evidence
7 in the 2010 case. His testimony was considered by Judge
8 Clevert in ruling on the summary judgment motion.

9 **THE COURT:** Okay.

10 **MR. RHOADES:** And so, the issue is whether the body
11 of evidence that existed in the 2010 case is the one that ought
12 to be carried forward to trial or whether that ought to be
13 expanded --

14 **THE COURT:** I see.

15 **MR. RHOADES:** -- and include Mr. Lewitzke's
16 testimony.

17 **MR. MC COY:** And that's my point, Judge, that
18 Lewitzke was a disclosed witness in the 2010 case, as well as
19 the 2013 case. He only gave testimony in the 2013 case.

20 **THE COURT:** Okay.

21 **MR. MC COY:** So when you get out to summary judgment,
22 there -- there was some question about it, but when you get to
23 trial, it doesn't matter because he's a disclosed witness for
24 trial.

25 **THE COURT:** All right. Well, as to that, I think I'd

1 prefer to have you-all give me a separate discussion of that
2 because I didn't -- I wasn't entirely clear that that was what
3 the main issue was. And as I'm going back looking at the
4 motion, I see that he's mentioned, but I was looking at the
5 broader -- in a broader context. So, we'll come back to that
6 in just a second in terms of dates for you-all getting me
7 something on that.

8 The fourth motion that the plaintiff filed asked me
9 to preclude any reference to the fact that any other court may
10 have barred or limited the testimony of either, I guess brought
11 it down to Dr. Anderson or Dr. Staggs, and the arguments of a
12 402, 403 relevance argument. And it basically says that I'm
13 the person who is supposed to make a decision as to
14 admissibility of expert testimony. That's absolutely true, but
15 this isn't a question with regard to admissibility of
16 testimony. This a question with regard to weight and
17 reliability and credibility. And that's a determination that's
18 entirely for the jury. So, I wouldn't necessarily exclude a
19 witness unless I had evidence that a number of other courts
20 perhaps had barred that person from testifying. But, I'm not
21 sure why that doesn't make it grounds for cross-examination if
22 you're attacking the credibility of a witness. I mean expert
23 witnesses are subject to attacks on their credibility just like
24 any other witness.

25 **MR. RHOADES:** And, Your Honor, I would also note that

1 even though Dr. Brody wasn't at issue with regard to the
2 Daubert motions of specific versus general causation, it would
3 apply to Dr. Brody because he has been excluded many times.

4 **MR. SCHUMACHER:** The admission of testimony is a
5 legal judgment, discretionary with each judge. I don't see how
6 that can be a factor with the jury unless there's some specific
7 piece of concrete evidence that goes to bias or unreliability.
8 I mean, I don't see how those legal rulings can have any effect
9 other than to confuse the jury because they're not trained in
10 the legal aspects, but that's a judge decision. But if there's
11 something specific that creates bias or whatever, then I think
12 that that certainly comes out but it's not because some other
13 judge made a ruling that the jury should make any decisions on
14 the credibility of a particular witness.

15 **THE COURT:** Well, I suppose to your point that a
16 judge may exclude an expert witness because the witness is an
17 expert but not on this particular topic, that doesn't
18 necessarily to credibility. Or a judge may exclude an expert
19 because they gave their opinion 15 years ago and now it's stale
20 and it's too old. I mean, I suppose there could be some that
21 don't relate to credibility.

22 **MR. SCHUMACHER:** Or he didn't have facts in the case.
23 I mean even some of the rulings I heard here where you're
24 limiting their testimony are based on specifics of this case
25 and what they had in this case. So, I just -- I mean, that's

1 the whole -- I just don't see -- I mean he can establish the
2 relevance of it because it's something that's the same -- like
3 you say some concrete piece of evidence about the witness that
4 is carrying forward to the current case and was also in the
5 past case. I mean I guess that would be appropriate, but
6 that's not what we're talking about here with Daubert-type
7 rulings. Those are very -- those are very different from court
8 to court. I mean --

9 **THE COURT:** All right, then I'm willing to -- to at
10 least say that if any of the defendants have information
11 showing that Brody -- and apparently, he's the one person to
12 whom this would apply --

13 **MR. RHOADES:** No, no, no. It would apply to all
14 three.

15 **THE COURT:** Oh, really?

16 **MR. RHOADES:** I was just noting you -- you had
17 mentioned, I suppose this only applies to Dr. Anderson and
18 Dr. Staggs.

19 **THE COURT:** Oh, I see.

20 **MR. RHOADES:** And I was saying, no, it would still
21 apply to Dr. Brody even if we did have a Daubert issue --

22 **THE COURT:** I see.

23 **MR. RHOADES:** -- because he's not offering specific
24 causation testimony.

25 **THE COURT:** I see, thank you. I'm sorry. I

1 misconstrued what I heard. Thank you.

2 But again, to the extent that any of these experts
3 were excluded for reasons other than -- I mean I don't think
4 it's relevant if somebody got excluded, for example, because
5 their expertise was in a different area than what that
6 particular court was dealing with. So --

7 **MR. RHOADES:** But then conversely, I mean, I can see
8 that, but conversely to say -- just to go back to our
9 discussions of an hour and a half ago, to say that
10 fundamentally their underlying methodology is so lacking that
11 they don't meet the --

12 **THE COURT:** If that's the reason.

13 **MR. RHOADES:** -- reliability standard of Daubert or
14 the general acceptance standard of Frye.

15 **THE COURT:** But that's what I'm saying.

16 **MR. RHOADES:** Yes.

17 **THE COURT:** If that's the reason that they were
18 excluded, then yes, I do think that that's relevant. Now, if
19 there's not been a motion -- yes, I do think that's relevant
20 for that basis. So, if there are people who have been excluded
21 for that reason, that I think that is a -- again, I think
22 that's an appropriate topic of cross-examination.

23 Mr. McCoy, you said several times that admissibility
24 is up to a court. And that's absolutely right. It's the
25 court's decision as to whether allow the witness to testify.

1 **MR. MC COY:** So even --

2 **THE COURT:** The credibility is a jury issue
3 determination.

4 **MR. MC COY:** But if the methodology is bad in this
5 case, then the witness is out. We wouldn't even have that
6 point. So -- so that example of bad methodology doesn't -- I
7 mean the witness wouldn't even be testifying in the first
8 place.

9 **THE COURT:** Okay. Well, then you-all can add this to
10 your list of things that you can provide me additional
11 information on.

12 **MR. MC COY:** I mean many witnesses have had certain
13 times --

14 **THE COURT:** I think I've --

15 **MR. MC COY:** -- when they've been excluded and a
16 million times where they testified. I mean, that's pretty much
17 the way it is. But --

18 **THE COURT:** I think we'll move on from this one for
19 now and then we'll come back to it.

20 Number five is the plaintiff asks that I exclude any
21 testimony or I assume -- that's not what it says -- but any
22 testimony or evidence that any medical condition other than
23 mesothelioma and asbestosis could've been the causes of
24 Mr. Ahnert's death. They argued -- Ms. Ahnert argues that the
25 death certificate from Texas says that he died by mesothelioma

1 and asbestosis and that that's controlling under Texas law.
2 And there's a long discussion about Texas law and the Texas
3 health code, and Texas cases and Texas information.

4 The defendants respond opposing the motion because
5 under Wisconsin law, the facts that are set forth in a death
6 certificate can be rebutted by evidence and they cite to
7 Eannelli's Estate, 269 Wisconsin 2d 192 at 212. It's an old
8 case, but every case from Wisconsin Supreme Court is old just
9 about. And -- okay, there have been a few recent ones. I'm
10 sorry. Don't repeat that. And the plaintiff -- the defendants
11 note that Mr. Ahnert -- I think it's uncontroverted -- had a
12 number of other physical issues and we've already talked about
13 the fact that Dr. Ellis may be on the plaintiff's witness list
14 in terms of testifying about his health condition and his
15 physical condition.

16 The defendants also point out that the death
17 certificate is not worded in such a way that it says these are
18 the only two causes of death. I don't -- I've never seen a
19 death certificate that's worded that way. There's a cause of
20 death and there's a word there. And so, there are all sorts of
21 other issues that could have impacted such as the defendants
22 indicate sarcoidosis, pulmonary fibrosis, CKD, obesity, throat
23 cancer, various things.

24 At any rate, I'm going to deny this motion. I think,
25 again, this gets kind of down to what we're talking about here.

1 And this whole discussion of Texas law and what Texas holds as
2 to the death certificate, Texas law doesn't control here. And
3 I know in Wisconsin law, the death certificate inclusion is
4 rebuttable.

5 So, did you want to question that ruling
6 Mr. Schumacher or were you just --

7 **MR. SCHUMACHER:** No.

8 **THE COURT:** Okay. I saw you open your mouth. I
9 thought you're going to say something --

10 **MR. SCHUMACHER:** Oh.

11 **THE COURT:** -- I was surprised.

12 **MR. SCHUMACHER:** Goodness no, no. I'm fine with that
13 ruling, Your Honor.

14 **THE COURT:** Okay. All right.

15 Number six, similar, to exclude any evidence that
16 Mr. Ahnert sustained or suffered any medical condition,
17 accident, toxic exposure, injury other than malignant or
18 nonmalignant asbestosis disease. It is -- it is absolutely, I
19 think, the same issue that that testimony certainly is relevant
20 because the whole issue here is causation.

21 And so, I'm going to deny that motion as well.

22 Motion number seven is --

23 **MR. MC COY:** There has to be -- there has to be a
24 medical witness to say that.

25 **THE COURT:** To say what?

1 **MR. MC COY:** To say that there's some other medical
2 condition that contributes to the --

3 **THE COURT:** Well, if they don't call a witness to
4 testify about that, then I guess we're having a discussion that
5 we don't need to have. I don't know who they're going to call
6 as a witness or not, but I'm not ruling that they can't
7 introduce evidence of that.

8 **MR. MC COY:** Our basis was nobody's been disclosed as
9 a witness.

10 **THE COURT:** Okay. Well --

11 **MR. MC COY:** I understand, Judge.

12 **THE COURT:** -- if someone doesn't get disclosed as a
13 witness, then I guess we just wasted those three minutes.

14 Number seven, and I assume that your same comment is
15 going to apply here, Mr. McCoy, but you asked that I exclude
16 any evidence or any testimony that cigarette smoking caused the
17 mesothelioma. I would be surprised, I suppose, if the
18 defendants were going to put on testimony that cigarette
19 smoking caused mesothelioma, but they might very well want to
20 put on some sort of evidence indicating that Mr. Ahnert was a
21 smoker and that could have impacted his health and could've
22 been a contributing factor to his passing. So --

23 **MR. MC COY:** The motion's limited to this causation
24 point and that's all it's limited to. It doesn't apply to what
25 Your Honor just said about that.

1 **THE COURT:** Okay. So, were you-all planning to put
2 on any evidence that Mr. Ahnert's mesothelioma was caused by
3 the fact that he smoked cigarettes?

4 **MR. SCHUMACHER:** I'll respond for Pabst.

5 **THE COURT:** Go ahead.

6 **MR. SCHUMACHER:** Certainly Pabst, as we acknowledged
7 in our motion, is not intending to argue that cigarette smoking
8 causes mesothelioma.

9 **THE COURT:** Right.

10 **MR. SCHUMACHER:** But there's certainly an issue --
11 and in fact, one of the plaintiff's experts opined on this --
12 that smoking does reduce the mucociliary response --

13 **THE COURT:** Yeah.

14 **MR. SCHUMACHER:** -- of the lungs, which could
15 potentially make one more susceptible to a variety of diseases,
16 including mesothelioma.

17 **THE COURT:** And that's why I was dividing it out.
18 Saying that smoking causes mesothelioma, I guess I've never
19 heard anybody say that ever, so if you-all were going to put on
20 testimony in that regard, I would be surprised. But --

21 **MR. SCHUMACHER:** No, we just -- I'm sorry. I didn't
22 mean to interrupt you, Your Honor.

23 **THE COURT:** But, no, but putting on evidence that
24 cigarette smoking affects one's overall health, including in
25 that way, and could have been a contributing factor is, I

1 think, an appropriate area for testimony and I think I just
2 heard Mr. McCoy say that that's -- he's not disputing it.

3 **MR. MC COY:** Right. That's not part of this motion.
4 The motion is just cigarette smoking causes mesothelioma.

5 **THE COURT:** Right. And I'll grant the motion as to
6 that specific statement.

7 Number eight asked that I exclude, I think, evidence
8 or information that the work history of "claimed" locations of
9 suspected exposure submitted in discovery. And again, I didn't
10 entirely understand it until I read it -- and then basically
11 what the text following that says is in responding to standard
12 interrogatories about claimed sites of asbestos exposure, the
13 plaintiff identified a group of locations. The list is sites
14 for which exposure is claimed. Evidence about claims made is
15 only admissible with the proper foundation of exposure and
16 causation, yeah, I guess I still don't. I'm not, I'm still a
17 little bit confused about what I'm being asked to exclude.
18 Mr. McCoy?

19 **MR. MC COY:** The list that's submitted because of the
20 interrogatories about claimed location exposure. That's --
21 that's what we want out. That doesn't exclude locations where
22 there's evidence of actual exposure. It just takes away the
23 list of claimed ones where there's not yet been any evidence.

24 **THE COURT:** Yeah, I'm sorry. You guys are so steeped
25 in this case and as you well know, I'm not. Are you saying

1 that when you were asked in an interrogatory, "Where are places
2 that you claim you might've been exposed," Ahnerts turned over
3 a list of possible locations?

4 **MR. MC COY:** Right, exactly.

5 **THE COURT:** You don't want the defendants to put that
6 list of possible locations into evidence?

7 **MR. MC COY:** Right, just that list, exactly.

8 **THE COURT:** Gentleman --

9 **MR. MC COY:** That's all it's about.

10 **THE COURT:** -- anybody planning to put in the list?

11 **MR. RHOADES:** Well, I think any signed discovery
12 response from the plaintiffs indicating that they believe that
13 he was exposed to asbestos at certain jobsites should be,
14 certainly, fodder for at least cross-examination, if not
15 outright admissible. It's a signed document from the
16 plaintiffs.

17 **MR. MC COY:** The relevance of something which is just
18 claimed versus something that there's evidence on is, I mean,
19 it just doesn't have any relevance. I mean, we were asked to
20 do that. We have to do it because that's a proper discovery
21 question.

22 **MR. RHOADES:** Because you have --

23 **MR. MC COY:** But as far as using the document later
24 at trial, it doesn't give a license to use everything that's in
25 the discovery questions.

1 **MR. RHOADES:** What it does is shift that the burden
2 to the defendants to try and dig up evidence. I mean
3 essentially, the plaintiff wants to use the shotgun approach in
4 the discovery phase and then force the defendants to use the
5 scalpel approach at trial.

6 **THE COURT:** Okay. I'll differ ruling on number eight
7 because I have a thought, but I can't articulate it right now.
8 Number nine --

9 **MR. MC COY:** And the reason why we filed these,
10 Judge, is because all these things have happened before, so.

11 **THE COURT:** I know. And I get that this is a
12 prophylaxis, but sometimes the problem with the prophylaxis is
13 that if you're trying to prevent every disease in the world,
14 you can't really target the prophylaxis.

15 **MR. MC COY:** Right. Well, we tried to limit it to
16 the ones that are most, I mean --

17 **THE COURT:** Okay, but --

18 **MR. MC COY:** -- in interviews with jurors and stuff,
19 the ones that seem to make differences.

20 **THE COURT:** And I may end up ruling in your favor. I
21 don't know, Mr. McCoy. But right now, I need to get after the
22 train that just escaped me in my head.

23 Number nine asks me to exclude any evidence that the
24 plaintiff received or was entitled to receive any kind of
25 benefits and then lists various collateral sources of benefits

1 where they could've come from.

2 Pabst responded by saying that they don't oppose the
3 motion, but there could be some certain conditions that could
4 come up that would make them want to revisit it, and so they
5 wanted to leave open the possibility of revisiting it.

6 Sprinkmann and WEPCO said that they don't oppose it
7 as it relates to hospital benefits, medical life insurance
8 proceeds, but they do oppose barring Social Security and
9 pension benefits. The plaintiff doesn't actually go into
10 specific details about what benefits they're talking about and
11 if they're talking about income-type benefits like Social
12 Security or pension benefits, I guess, is what I'm
13 understanding the defendants are objecting to. Is that -- are
14 you seeking to bar income type benefits?

15 MR. MC COY: I don't know. There's no claim for lost
16 income so, I don't know how that would matter here in this
17 case. I mean it wouldn't be relevant to put in anything about
18 income.

19 MR. RHOADES: I think Social Security and pensions is
20 right in the title of their brief, which is why we responded
21 the way we did.

22 MR. MC COY: Maybe -- maybe that's our mess-up for
23 having that in there. Yeah, I mean, we shouldn't -- I mean the
24 point is that that's not relevant because there's no lost
25 income claim.

1 **THE COURT:** Well, I'll grant the motion for now and
2 if something ends up coming out that impacts that, we'll go
3 from there.

4 Number 10 asks me to exclude any evidence the
5 plaintiff received or was entitled to receive money in
6 settlement against other parties, nine parties, and I think
7 this is very similar to the excluding settlement discussions or
8 settlement -- we've already talked about that. And that's a
9 Rule 408 issue.

10 The defendants have opposed the motion because they
11 say it could show bias, attack credibility, or establish
12 comparative fault. The jury should hear that certain parties
13 were parties before their claims were settled and its
14 apportionment of responsibility. I guess the argument is this
15 goes to damages? Is that --

16 **MR. MC COY:** I think the argument is about --

17 **THE COURT:** I'm actually asking Mr. Rhoades, sorry.

18 **MR. MC COY:** Oh.

19 **MR. RHOADES:** Your Honor, I think this more probably
20 is closely related to the subject matter of Motion Number 12,
21 which deals with this body of bankruptcy trust applications and
22 the application process. Some of them involve affidavits that
23 he was exposed to a certain product at a certain location.

24 **THE COURT:** Oh.

25 **MR. RHOADES:** Things like that that are solely done

1 in pursuit of a settlement from a bankruptcy trust of a
2 particular manufacturer or location of which there are dozens
3 in this case.

4 **THE COURT:** Oh, I thought this -- okay. I thought --

5 **MR. MC COY:** Ten is different from 12. And they're
6 not, they're not the same.

7 **MR. SCHUMACHER:** It still could be an issue of
8 comparative fault.

9 **MR. MC COY:** Sure. That says we don't exclude that.
10 We specifically say that the -- if there's evidence of the
11 exposure, then that doesn't strike -- this motion is not
12 directed at that. It's not directed at the verdict form. It's
13 directed at there having been a settlement with somebody
14 before.

15 **THE COURT:** So you're simply trying to exclude any
16 evidence that the plaintiff settled with somebody else?

17 **MR. MC COY:** Right, right, that the claim was settled
18 with somebody else and that's all -- that's all it was about.
19 It's not about who goes on the verdict form.

20 **THE COURT:** So, so what's the relevance of just the
21 fact that they settled with some other nonparty?

22 **MR. RHOADES:** Well, the Wisconsin Supreme Court has
23 held in another one of these old cases -- although it's still
24 younger than me -- that evidence of a settlement can be used
25 also to show bias of witnesses. It's -- we're not -- we're not

1 -- it can't be used to show liability. Can't be used to show
2 invalidity of claims, but it can be used to show bias of
3 various witnesses. It can be used to attack the credibility of
4 a witness. I mean, part of this is -- as we discussed earlier
5 to a certain nature of -- the prophylactic nature of motions in
6 limine and not knowing exactly what sort of, you know, evidence
7 is going to be put on. But the evidence of a settlement in and
8 of itself can have probative value.

9 **THE COURT:** Okay, then I'm going to --

10 **MR. MC COY:** The bias issue, Judge, would be if
11 somebody got money and -- from a defendant and then attempts to
12 give product exposure information or, you know, previous owner
13 exposure information and some -- and because they got money
14 from this other defendant, they're trying to -- they're biased
15 in that that defendant is one they got money from, but they're
16 going to minimize the testimony of their exposure as to that
17 defendant that was -- or the nonparty that was settled. The
18 only person who got money, in this case, is Mrs. Ahnert. She's
19 the only one that might have the bias and she doesn't have any
20 information about any place like that.

21 **THE COURT:** So, what I --

22 **MR. MC COY:** So, I just -- I just -- there's no
23 possibility of bias here.

24 **THE COURT:** So, what I was about to say was that I'm
25 going to defer ruling on this one because I think it's

1 extremely fact-bound as Mr. McCoy's explanation just pointed
2 out. And so, if indeed Ms. Ahnert is the only person who
3 received a settlement and doesn't have any information, then I
4 think this becomes something of a moot -- moot point.

5 Number 11 asked me to exclude references, other than
6 during jury selection, to the names of people who are potential
7 witnesses or that they are identified in interrogatory answers
8 or other discovery. And the argument is that, you know, it's
9 not relevant to a jury who we choose to call as witnesses. And
10 that's not important.

11 And the defendants oppose the motion I believe, if
12 I'm still looking at the right one, because there are witnesses
13 who are identified but are not called and that may have to do
14 with burden of proof.

15 Right now, we don't have witness lists, so we don't
16 know whether or not this is relevant. Some I'm going to defer
17 ruling on it but I will say this. It is certainly not uncommon
18 -- and you've all heard it happen in trials and I don't think
19 it's improper -- for an attorney to say, you know, that they
20 could have called so-and-so to come in here and tell you "fill
21 in the blank" that was possible. And they didn't. You heard
22 no evidence at all on that whatsoever and that's why they
23 haven't met their burden of proof as to element whatever. I
24 think that's basically what the defendants' response was to
25 this motion.

1 So, if that's what the motion seeks to exclude, I'm
2 not going to grant the motion in that regard. It's one thing
3 if somebody wants to stand up and say, they give us a witness
4 list that had 100 people on it and they only called four.
5 Well, that's stupid and irrelevant as most of us know because
6 that's the way trial practice works. You have to disclose
7 every possible witness even if you're not sure you're going to
8 call him or you may call them in impeachment. But that's
9 different than getting up and saying, you know, you didn't hear
10 -- they didn't call even though Mr. -- what's his name that
11 starts with the W that I've suddenly lost --

12 **MR. MC COY:** Wetzzel?

13 **THE COURT:** No. Anyway, sorry.

14 **MR. RHOADES:** Oh, Lewitzke?

15 **THE COURT:** Whoever's still with us.

16 **MR. RHOADES:** WEPCO.

17 **THE COURT:** No. Even though there is -- no. It
18 probably doesn't start with a W at this point and so we're all
19 grasping at straws that don't even exist but we've got a
20 witness, the witness is alive and kicking. The plaintiff
21 could've called that witness to come in and testify to a very
22 specific fact and for whatever reason didn't. I don't think
23 there's anything improper about a party saying they could've
24 called Mr. Jones. They didn't call Mr. Jones. You didn't hear
25 anything from Mr. Jones and so you don't have that evidence in

1 front of you. That is -- I think that is appropriate, but
2 again, I'll defer specific rulings until I see who we may be
3 talking about.

4 Now, here's number 12 that Mr. Rhoades just made
5 reference to, which is this, the bankruptcy trust funds and the
6 motion specifically says that the plaintiff submitted claims to
7 several bankruptcy trust funds and there are documents that are
8 submitted in support of those claims and those documents were
9 produced to the defendants.

10 The plaintiff's argument is counsel prepared most of
11 these documents and so it's not necessarily something that was
12 prepared by Mr. Ahnert by Ms. Ahnert and the fact that they
13 submitted those claims to the trust isn't admissible at trial.
14 Again, this is in reference to the fact that the claims
15 asserted is not -- is not relevant. I'm not sure I follow that
16 argument, but there are several other arguments as to why this
17 is not relevant.

18 However, defendants have opposed that motion and
19 their real basis for opposing is to say, you know, if there are
20 other people -- places other than these defendants were
21 Mr. Ahnert was exposed to asbestos or possibly claimed that he
22 was exposed to asbestos, that's also relevant. Because again,
23 we're talking about causation. I think this is a document-
24 specific issue, obviously, and I'll look more closely at it
25 with regard to specific documents, but I'm not going to

1 preclude generally any reference to any documents connected to
2 claims submitted to any of these bankruptcy trusts because of
3 Mr. Ahnert at some point, or Ms. Ahnert were claiming that he
4 was exposed to asbestos other places than these defendants,
5 that is relevant.

6 The next motion 13 asked me to exclude any evidence
7 about how Mr. McCoy or any of the other plaintiffs' lawyers
8 were compensated and the defendants don't oppose that. So,
9 I'll grant that motion.

10 The same thing for 14, as to exclude any evidence
11 about the time and under the circumstances why Mr. Ahnert
12 employed a lawyer -- doesn't oppose that either. So, I'll
13 grant that motion.

14 Fifteen, that Mr. McCoy's firm represents or has been
15 referred to other asbestos cases. They want to exclude -- the
16 defendant -- the plaintiff wants to exclude reference to that.
17 Pabst doesn't oppose that, so I don't have a problem with that.
18 So, I will grant that motion.

19 Sixteen asks that I preclude any evidence that
20 asbestos lawsuits or that the plaintiff's claims are in any way
21 lawyer-made lawsuits or somehow or another that attorneys are
22 out there trying to generate money by finding these lawsuits.
23 Pabst doesn't oppose that motion. And I agree. I'll grant
24 that motion.

25 Number 17, the plaintiff asks to exclude statements

1 about asbestos exposure at locations or from products that
2 weren't disclosed or found to be irrelevant or speculative
3 during the discovery process.

4 And Pabst basically responds by saying yeah, I mean,
5 obviously we have to lay a foundation for any evidence that
6 it's relevant and we'll do that. And if we don't, then we
7 ought not be able to put it in and that that's not really -- a
8 foundation issue is not a motion in limine issue. And I agree
9 with that and I will rule on foundation during trial.

10 So, I will deny 17. And to the extent that if
11 something comes up at trial specifically with regard to
12 foundation with a particular witness or particular piece of
13 evidence, of course, I'll take that up at trial.

14 Eighteen asks me to exclude evidence that the
15 plaintiff was required to present documentary evidence from the
16 defendant in order to prove the presence of asbestos in
17 proximity to the plaintiff.

18 The defendants have opposed this motion because it is
19 the plaintiff's burden to show that Mr. Ahnert was exposed to
20 asbestos-containing products and that it was a substantial
21 factor in causing the disease and they cite to a case from the
22 Western District of Wisconsin to show that. As I understand
23 this, I think what the plaintiff is trying to argue is there's
24 no law out there that says I have to present a document, a
25 piece of paper, that -- from the defendant showing that there

1 was asbestos close to Mr. Ahnert. Other kinds of evidence can
2 be used to show that, witness testimony, whatever else. Is
3 that what you're arguing, Mr. McCoy?

4 **MR. MC COY:** Yes, that's right.

5 **THE COURT:** Okay. And to that extent, I agree. And
6 I'll sustain the motion to that extent. And so, if the
7 defendants get up and say, you know, they have to give you a
8 document and they didn't, that's inappropriate. Now, if the
9 defendants get up and say, you know, the testimony is not
10 believable or the testimony is not reliable and you haven't
11 seen anything else, you've seen no documentary evidence, you've
12 seen no whatever, I think that's a perfectly appropriate
13 argument. And I think they can make that argument. But there
14 is no law or statute that I'm aware of that says you have to
15 produce a piece of paper in order to prove that there was
16 asbestos present.

17 So, I'll grant the motion to that extent.

18 Number 19, asks that I exclude evidence that the
19 plaintiff was required to present documentary evidence from the
20 defendant -- that was just 18, sorry.

21 **MR. MC COY:** Nineteen is different.

22 **THE COURT:** I haven't flipped the page.

23 **MR. MC COY:** Right.

24 **THE COURT:** They want to exclude evidence that as to
25 Pabst, the plaintiff doesn't have any business records like

1 sales or invoices or contracts which show that Pabst purchased
2 asbestos for use at the Pabst Brewery and I guess, again, this
3 is in anticipation of the fact that Pabst is going to argue,
4 hey look, you can't show that we bought any asbestos-containing
5 materials and it says that, you know, in order to make that
6 argument, Pabst has got to show that there was some sort of
7 preservation policy or whatever else.

8 I'm going to deny this motion because, again, I don't
9 think that the blanket proposition that Pabst can't get up and
10 say you haven't seen any business records is an appropriate
11 one. Of course, it's a subject for discussion in terms of
12 Pabst saying, hey look, if Pabst presents witnesses that say we
13 have a document preservation policy and we would've had all
14 these invoices and we would've kept all the stuff and we didn't
15 and so that shows that we didn't have it, I think that that's
16 appropriate testimony. And they can present that. If they
17 don't lay a foundation, the plaintiff can obviously argue that
18 there's no foundation for the testimony and I'll take that up
19 just like I would any other foundational objection. But I'm
20 not gonna, at this stage, make a blanket ruling that they can't
21 testify, Hey the plaintiff hasn't shown you any business
22 documents of that nature showing that we bought anything and
23 that's because there isn't any. They can make that argument if
24 they support it with the appropriate foundation.

25 And I think with that that we've touched on

1 everything, even if I have it necessarily ruled on it.

2 So, unless anybody can think of anything that I've
3 missed, I think the last issue that we want to address is that
4 there are a couple of these that I asked you for more
5 information on. For example, the dates with regard to those --
6 oh, shoot.

7 **MR. MC COY:** Mr. Ahnert's work at Pabst do you mean?

8 **THE COURT:** Thank you, thank you, Mr. McCoy.

9 **MR. MC COY:** Yeah, I have a list of a few, Judge.
10 Maybe -- maybe we should just -- I mean I would suggest either
11 Your Honor puts it in a text order as to which ones need more
12 briefing or that we get together collectively with our notes
13 and give you our list of what it should be.

14 **THE COURT:** Yeah. And I can -- I can go through and
15 remind myself because I have better notes and I think other
16 people have kept notes besides me because they know. But what
17 I wanted to talk about was the timing in terms of when you-all
18 would present that information and perhaps the best way to do
19 that is for you all to propose a time to me once you've had a
20 time to look at what I'm asking for because some of it you may
21 need a little more time to collect than others.

22 **MR. MC COY:** I would say on the list of items that do
23 need more briefing, I'd say that it could be done within two
24 weeks and then --

25 **THE COURT:** You don't even remember --

1 **MR. RHOADES:** Yeah. I'm not agreeing -- I'm not
2 agreeing to that right here.

3 **MR. MC COY:** We should, we should actually get the
4 transcript I suppose first. So that might be --

5 **THE COURT:** I think that might help everybody.

6 **MR. MC COY:** Right.

7 **THE COURT:** Because then whatever gobbledygook came
8 out of my mouth, would at least be --

9 **MR. MC COY:** Right. So, I'd say within two weeks
10 after the transcript for sure.

11 **THE COURT:** Well, I'm not going to bind the
12 defendants to that right now because, again, they need to go
13 back and look at what they've got to collect and figure out
14 what they've got to collect. And I think you need to do the
15 same thing.

16 So, what I propose is that you-all get the transcript
17 and then submit a document to me once you've had an opportunity
18 to talk about it. If you can agree on a time frame for
19 providing me the additional information, great. If you can't,
20 then say the plaintiff proposes X and the defense proposes Y.
21 And then I'll do something.

22 **MR. MC COY:** Right.

23 **THE COURT:** Okay. Mr. McCoy, assuming that your
24 brain function is far better than mine, anything else that you
25 can think of that you can trust me to try and take care of this

1 afternoon?

2 **MR. MC COY:** No, nobody wants to listen to me
3 anymore, Judge, based on, based on that last reaction.

4 **THE COURT:** That's okay.

5 **MR. MC COY:** So I have -- I have -- no, I have
6 nothing further in my notes right now to be covered.

7 **THE COURT:** Okay. You and I are in the same boat in
8 terms of people not wanting to listen to us anymore.

9 Mr. Rhoades?

10 **MR. RHOADES:** Nothing further, Your Honor, thank you.

11 **THE COURT:** Okay. Anything else?

12 **MR. SCHUMACHER:** Nothing from me, Your Honor. Thank
13 you for this lengthy time that you spent with us.

14 **THE COURT:** Well, thank you-all for sticking around.
15 I know you don't have much of a choice, but you guys can just
16 head back to your office. So, I appreciate everybody sticking
17 around for a long afternoon. And I apologize for how long it
18 was, but hopefully it will save us time in other -- on other
19 occasions. Thanks everybody, bundle up, and stay warm.

20 **MS. SPEAKER:** Thank you.

21 **MR. MC COY:** Goodbye.

22 **(Proceeding concluded at 5:54 p.m.)**

23

24

25

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in black ink, appearing to read "Toni Hudson", written over a horizontal line.

January 8, 2018

TONI HUDSON, TRANSCRIBER